CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS, PETITIONER,

vs.

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1933

CERTIORARI GRANTED APRIL 10, 1933

(37,429)

(37,429)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS, PETITIONER,

vs.

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, Southern New York	1	1
Statement of case	1	1
Notice of motion for decree, etc	6	4
Affidavit of Richard Reid Rogers in support of motion	9	5
Amended complaint in Rogers v. Hill et al., E. 59-115	12	7
Exhibit A—Resolution passed at annual meeting of stockholders, March 13, 1912	23	14
Exhibit B—Notice to stockholders of annual meeting, March 13, 1912	26	16
Exhibit C—Charter and by-laws	27	17
Exhibit D—Letter of Richard Reid Rogers to The American Tobacco Company, dated March 12, 1931, demanding that suit be instituted against certain of its officers	60	38
Exhibit E—Letter of Richard J. Boylan, secretary of the company, dated March 19, 1931, in reply to letter of R. R. Rogers	61	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1933

	Original	Print
Answer of defendants Hill, Neiley, Riggio, Taylor, and The American Tobacco Company	65	42
Exhibit A—Article XII of the by-laws	110	70
Order for further particulars, etc	113	72
Stipulation as to further particulars	116	74
Bill of particulars	118	75
Exhibit A—Employees' stock subscription plan	121	76
Exhibit B—Resolution relating to employees' stock subscription plan adopted at special meeting of the stockholders, July 28, 1930	124	79
Exhibit C—Statement by the company relating to employees' stock subscription plan sent to all stockholders	125	79
Affidavit of J. Arthur Leve referring to order of consolidation	177	116
Order of consolidation	179	117
Stipulation as to consolidation	181	118
Complaint in Rogers v. Taylor et al., E. 60-94	184	119
Exhibit A—Resolution passed at annual meeting of stockholders, March 13, 1912 (copy) (omitted in printing)	192	
Exhibit B—Notice of annual meeting of stockholders, March 13, 1912 (copy) (omitted in printing)	195	
Exhibit C—Charter and by-laws (copy) (omitted in printing)	195	
Exhibit D—Letter of Richard Reid Rogers to the company, dated March 12, 1931, demanding that suit be instituted against certain of its officers (copy) (omitted in printing)	196	
Exhibit E—Letter of Richard J. Boylan, secretary of the company, to Richard Reid Rogers, dated March 19, 1931 (copy) (omitted in printing)	197	
Order for further particulars in Rogers vs. Taylor et al., E. 60-94	202	125
Stipulation as to further particulars, E. 60-94	204	126
Bill of particulars in Rogers vs. Taylor et al., E. 60-94	206	126
Memorandum re Exhibits "A" and "B"	208	127
Affidavit of James B. Harvie	209	128
Opinion of Caffey, D. J	211	129
Order appealed from	214	131
Petition for appeal and order thereon	217	133
Assignment of errors	219	134
Stipulation as to record	221	135
Order settling case	221	135
Clerk's certificate (omitted in printing)	222	
Statement on second appeal	223	136
Opinion, Manton, J., United States circuit court of appeals, upon former appeal	225	138
Dissenting opinion, Swan, J., upon former appeal	235	145

	Original	Print
Order for mandate upon former appeal	238	147
Mandate upon former appeal	239	148
Decree dismissing complaints	242	150
Petition for appeal and order allowing same	244	152
Assignments of error	245	152
Order as to record	247	153
Stipulation as to record	251	156
Clerk's certificate (omitted in printing)	252	
Proceedings in United States circuit court of appeals, second circuit	253	156
Opinion per curiam	253	157
Decree	254	157
Clerk's certificate (omitted in printing)	256	
Order allowing certiorari	257	158

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E-60-94

RICHARD REID ROGERS, Plaintiff,

against

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. Riggio, and The American Tobacco Company, Defendants

RICHARD REID ROGERS, Plaintiff,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants

Consolidated Cause

STATEMENT

This is a consolidated cause formed of two original suits, as follows:

First, an action instituted in the Supreme Court, County of New York, State of New York, by Richard Reid Rogers as plaintiff, against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company. Defendants Neiley and The American Tobacco Company served March 30, 1931; defendants Penn and Riggio served March 31, 1931; defendant Hill served April 2, 1931. Defendant Mower has never been served. [fol. 2] Defendant Penn, a resident of North Carolina, died October 22, 1931, and the action has not been revived against his estate. A notice of examination before trial of defendant, The American Tobacco Company, through its President, George W. Hill, and examination of defendant Hill personally, was served March 30, 1931. The action was removed to the United States District Court for the Southern District of New York by petition of The American Tobacco Company served March 31, 1931, and by peti-

tion of Charles A. Penn served April 18, 1931, in each case on the ground of diverse citizenship, the company being a New Jersey corporation and Charles A. Penn a resident of North Carolina, and a separable controversy was set forth as to each removing party. Certified copies of the transcript of the record were filed in the United States District Court April 4 and 6, 1931, and April 20, 1931. A motion to remand to the State Court was denied as to both petitions November 6, 1931. An order was signed by the Honorable John C. Knox, United States District Judge for the Southern District of New York, April 6, 1931, enjoining and restraining plaintiff from taking any further proceedings in the above cause of any kind or nature whatsoever in the Supreme Court, New York State, and also from proceeding with the examination before trial.

Second, an action instituted in the United States District Court for the Southern District of New York, by Richard Reid Rogers, as plaintiff, against Thomas R. Taylor and The American Tobacco Company. The American To-
[fol. 3] bacco Company was served May 28, 1931 and Thomas R. Taylor was served June 8, 1931.

By stipulation of the parties and an order entered thereon November 24, 1931, the two actions were consolidated into one action in this Court and the orders and proceedings heretofore had in said causes were made orders and proceedings in the consolidated cause. The amended complaint served in Rogers v. Hill, et al. (Equity 59-115) to serve as amended complaint in Rogers v. Taylor, et ano. (Equity 60-94). Any answer filed in Rogers v. Hill, et al. (Equity 59-115) to be deemed an answer in Rogers v. Taylor, et ano. (Equity 60-94).

Motions for further and better particulars in Rogers v. Hill, et al. (Equity 59-115) and Rogers v. Taylor, et ano. (Equity 60-94), were granted November 6, 1931. A stipulation and order thereon in Rogers v. Hill, et al. (Equity 59-115) was entered November 6, 1931, providing that the information to be furnished was furnished in the amended complaint served in this action subsequent to the motion except certain items to be furnished separately in a bill of particulars. Such bill was to be deemed as if incorporated and set forth at length in the amended complaint. A bill setting forth further particulars was received November 11, 1931 in the action numbered Equity 59-115. Stipulation

and order thereon in Rogers v. Taylor, et ano. (Equity 60-94) entered November 6, 1931, providing for the service of a bill of particulars in lieu of an amended complaint. [fol. 4] Such bill to be considered as if incorporated and set forth at length in the complaint therein. A bill setting forth further particulars received November 11, 1931 in the action numbered Equity 60-94.

There has been no change in the party-plaintiff herein. The only defendants now before the Court are George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, all of whom have appeared in the consolidated cause.

An amended complaint in Equity 59-115, to be considered the amended complaint in the consolidated cause, was filed November 30, 1931.

The answer of defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, was filed December 7, 1931.

No question has been referred to a Commissioner, Master or Referee.

None of the defendants has been arrested, nor has any bail been taken or property attached or arrested.

A motion on the pleadings was made by plaintiff in the District Court:

(1) For an order striking out the separate defenses in the answer of defendants Hill, et al.;

(2) For a decree adjudging the by-law of 1912 invalid, requiring the defendants Hill, Neiley and Riggio to account for all payments received by them thereunder, and enjoining further payments thereunder; and

[fol. 5] (3) In the alternative, for an injunction pendente lite restraining further payments under said by-law.

Heard by Judge Caffey January 15, 1932.

Opinion rendered by Judge Caffey March 18, 1932, and order dated March 23, 1932, and entered March 24, 1932, granting plaintiff's motion for an injunction pendente lite.

Bond on injunction approved and filed March 30, 1932; writ of injunction issued, served and filed, March 31, 1932.

Appeal allowed March 31, 1932.

[fol. 6] IN UNITED STATES DISTRICT COURT

In Equity. 60-94. Consolidated Cause

[Title omitted]

NOTICE OF MOTION FOR DECREE, ETC.

Please take notice that at a stated term of this Court for the hearing of motions to be held in the United States Post Office Building in the Borough of Manhattan and City of New York on the 12th day of January, 1932, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, a motion will be made for the following relief:

1. Upon the amended complaint filed by the plaintiff herein, with the exhibits accompanying same and made a part thereof, the bill of particulars furnished by the plain-[fol. 7] tiff, and the answer of the defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, all of which are on file in the office of the Clerk of this Court; for an order striking out the First, Second, Third, Fourth and Fifth Separate Defenses of the said answer, upon the ground that they are irrelevant and insufficient and do not constitute legal defenses to the said complaint.

2. Upon all of the pleadings in said suit, to-wit, the aforesaid amended complaint with the exhibits accompanying same and made a part thereof, the aforesaid bill of particulars and the aforesaid answer of the defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, all of which are on file in the office of the Clerk of this Court; for a decree adjudging the by-law of 1912 invalid, requiring the defendants George W. Hill, C. F. Neiley and Vincent Riggio to account for all payments severally received by each of them thereunder, and enjoining the defendant The American Tobacco Company from making any further payments thereunder.

3. In the alternative to the relief mentioned in paragraph 2 of this notice of motion, if the same be not granted, and upon the aforesaid amended complaint, duly verified, with the exhibits accompanying same and made a part thereof, the aforesaid bill of particulars, duly verified, and the affi-

davit of Richard Reid Rogers annexed hereto, sworn to on [fol. 8] the 7th day of January, 1932; for an interlocutory injunction enjoining the defendant The American Tobacco Company from making any further payments to any president or vice-president under said by-law pendente lite.

Dated New York, N. Y., January 7th, 1932.

Richard Reid Rogers, Plaintiff in sua Persona. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

To Chadbourne, Stanchfield & Levy, Esqs., attorneys for defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, 25 Broadway, New York, N. Y.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RICHARD REID ROGERS IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Richard Reid Rogers, being duly sworn, deposes and says that he is the plaintiff in the above-styled action and is in personal charge of the conduct thereof. Deponent further states:

This case involves the legality of certain bonus payments made by The American Tobacco Company to its president and five vice-presidents for the years 1921 to 1931, inclusive, approximating $8,170,000. The complaint alleges that [fol. 10] the original by-law passed in 1912 under which these payments were made was ultra vires, illegally adopted and void. As to this issue the facts are fully presented by the pleadings and can be decided without the introduction of further proof than the admissions in the answer. In event that the Court should hold the by-law to be valid and binding on the plaintiff, there would remain the equitable question whether the payments under the by-law of 1912, which, when added to the fixed salaries and other cash emoluments claimed by the individual defend-

ants and admitted by the defendant company, aggregated for the year 1930 alone for the president approximately $1,280,000, and for the vice-president serving the full year from approximately $550,000 to $784,000 each, and will aggregate for the year 1931 considerably in excess of the above amounts, are exorbitant and unreasonable and subject to revision by a court of equity; but this relief is prayed for in the alternative and will only become a matter of equitable cognizance in event the by-law of 1912 is first held to be valid. A decision on the pleadings that the by-law of 1912 was and is invalid would therefore dispose of the whole case.

Deponent further says that it is customary for the defendant company to distribute the profit participation under the by-law of 1912 as soon as the accounts of the company for the previous year terminating December 31st can be made up, and that unless the payments referred to are enjoined they will shortly and in all probability before the end of the month be distributed to the existing president and vice-president, with the exception of defendant Taylor, [fol. 11] as hereinbefore referred to, to the irreparable damage of the company and its stockholders.

Deponent further says that according to the last annual report of the defendant, The American Tobacco Company, the net earnings of the company for the year 1930, after paying profit distribution to the president and vice-presidents were $43,345,370.00; but that the net earnings or profits before such distribution were approximately $45,069,308, as shown by the profit distribution paid the president for that year, to wit, $842,507.72, which sum was 2½ per cent of the excess of the net profits of the company over $11,369,000, as shown in Exhibit A to the answer.

(Sgd.) Richard Reid Rogers.

Subscribed and sworn to before me this 7th day of January, 1932. (Sgd.) Anderson Woods, Notary Public, Kings County, No. 335. Certificate filed in N. Y. County No. 395. Commission expires March 30, 1933. (Seal.)

[fol. 12] In United States District Court, Southern District of New York

In Equity. Consol. 59-115

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendant

Amended Complaint

The plaintiff who sues on behalf of himself and all other stockholders of the defendant, The American Tobacco Company, who choose to come in and contribute to the costs and expenses of this action, alleges by way of amended complaint:

1. He is a citizen of New York and the owner and registered holder of 200 shares of the Common Stock of defendant company acquired in 1916, and 400 shares of the Common Stock B of said Company acquired since 1925.

2. The American Tobacco Company is a corporation organized under the laws of New Jersey prior to 1905, and is engaged in the manufacture and sale of tobacco products. Its principal place of business, where its chief executives have their offices and where its board of directors customarily meets, is at 111 Fifth Avenue in the City of New York.

3. On the first of January, 1931, its capital structure was as follows: Preferred stock having a par value of $100 a [fol. 13] share, authorized $540,010,600, outstanding $52,699,700; Common Stock having a par value of $25 a share, authorized $50,000,000, outstanding $40,242,400; Common Stock B having a par value of $25 a share, authorized $100,000,000, outstanding $76,933,950. In addition, it had outstanding on that date bonds of the par value of $1,064,350. Its current liabilities were approximately $5,000,000, and its current quick assets were approximately $147,000,000.

4. The Common Stock B was authorized by an amendment of the charter in 1920. It has the same financial

status as the Common Stock, but no voting rights on corporate management.

5. The defendant Hill is a resident of New York and from April 6, 1921, to date has been a director of The American Tobacco Company; from April 6, 1921 to April 7, 1926 a Vice-President; and from April 7, 1926 to date President of said Company. The defendant Mower is a resident of New York and from April 6, 1921 to date has been director, and from April 4, 1923 to date a Vice-President of said Company. The defendant Penn is a resident of North Carolina and has been from April 6, 1921 to date a director, and from April 6, 1921 to date a Vice-President of said Company. The defendant Neiley is a resident of New York and has been from April 6, 1921 to date a director, and from May 1, 1929 to date a Vice-President of said Company. The defendant Riggio is a resident of New York and has been from April 4, 1928 to date a director, and from May 1, 1929 to date a Vice-President of said Company.

[fol. 14] 6. The defendant Hill receives fixed salaries of $168,000 a year; his fixed salaries since he became President having been increased from $75,000 during his first three years in office to $144,500 in 1929, and $168,000 in 1930. The defendant Penn receives fixed salaries of $98,000, his fixed salary or salaries have been increased from $45,000, which he drew from 1921 to 1929, to $81,166.66 in 1929 and $98,000 in 1930. The defendant Mower receives fixed salaries of $50,000, his fixed salaries having been increased from $45,000, which he drew from 1923 to 1929, to $49,166.66 in 1929 and $50,000 in 1930. The defendants Neiley and Riggio received fixed salaries of $50,000, having been increased to that amount from $33,333.32, paid in 1929, when they were first elected Vice-Presidents.

7. In addition to their fixed salaries the individual defendants received for 1929 and 1930 cash credits as follows:

	1929	1930
To defendant Hill	$136,507.71	$273,470.76
To defendant Penn	90,702.80	181,708.12
To defendant Mower	45,351.40	90,854.06
To defendant Riggio	45,351.40	90,854.06
To defendant Neiley	44,897.89	89,945.52

The legality of these credits is not admitted, and proceedings have been instituted to effect their restoration to the defendant company; but they were actually received and the defendants assert the right to retain them.

[fol. 15] 8. In addition to their fixed salaries as hereinbefore and the profit distributions hereinafter set out, the individual defendants claim the right to receive as additional compensation for services to be rendered between January 28th and December 31, 1931, the following valuable emoluments: Under a socalled employees' stock subscription plan, claimed to have been adopted by the stockholders of the defendant company July 28, 1930, the legality of which is not admitted, however, and which is the subject of an independent litigation, there was by resolution of the board of directors of defendant company, January 28, 1931, allotted to the several defendants herein by the board of directors upon the recommendation of defendant Hill and accepted by them in writing Common Stock B of the company at $25 a share, which stock had on that day a market value of $112 a share, and now has a market value in excess of $120 a share, as follows: to defendant Hill 13,440 shares, to defendant Penn 8,025 shares, to defendant Riggio 4,000 shares, to defendant Neiley 3,000 shares and to defendant Mower 1,000 shares. Such stock may be paid for by dividends declared thereon or in cash at the option of the allottees; but cannot be delivered whether paid for or not before December 31, 1931.

9. The plaintiff alleges that in addition to the fixed salaries and emoluments hereinbefore referred to the defendant company paid by way of profit distribution to the individual defendants from the year 1921 to 1931 inclusive (the payments made prior to 1921 not being included in the scope of this complaint) the following sums:

[fol. 16] To defendant Hill: $89,833.94 in 1921; $82,902.61 in 1922; $77,336.54 in 1923; $88,894.26 in 1924; $97,059.38 in 1925; $188,643.45 in 1926; $268,761.45 in 1927; $280,203.68 in 1928; $447,870.30 in 1929 and $842,507.72 in 1930.

To defendant Penn: $89,833.94 in 1921; $82,902.61 in 1922; $77,336.54 in 1923; $88,894.26 in 1924; $97,059.38 in 1925; $119,185.88 in 1926; $161,256.85 in 1927; $168,122.20 in 1928; $268,722.18 in 1929; and $505,504.63 in 1930.

To defendant Mower: $16,358.96 in 1924; $24,524.08 in 1925; $100,109.09 in 1926; $161,256.85 in 1927; $168,122.20 in 1928; $268,722.18 in 1929; and $505,504.63 in 1930.

To defendant Neiley: $115,141.87 in 1929 and $409,495.25 in 1930.

To defendant Riggio: $115,141.86 in 1929 and $409,495.25 in 1930.

10. The distributions set out in the preceding paragraph were made under and by virtue of a by-law claimed to have been adopted by the stockholders of defendant company March 13, 1912, commonly known as by-law XII. The said by-law, together with the prior notice to stockholders of the meeting at which it was to be acted on, together with the record of the proceedings of that meeting are hereto attached and made a part hereof as Exhibits A and B.

11. The plaintiff further alleges that upon the basis of current profits, which chiefly due to a recent increase of 45 cents a thousand in the wholesale price of cigarettes, are now running at a rate in excess of $60,000,000 a year, the [fol. 17] profits distributable under by-law XII for the year 1931 will exceed $5,000,000, and that that amount unless enjoined will be distributed shortly after the close of the present year by the defendant company to its President and Vice-Presidents, among whom may or will be included the individual defendants to this action.

12. The plaintiff alleges that the aforesaid by-law under which the profit distribution was made and may hereafter be made was illegal, ultra vires and void for the following reasons: (1) because by the charter of the defendant, The American Tobacco Company, hereto annexed and made a part hereof, as Exhibit C, the directors were empowered to apply any surplus or net profits or earnings over and above the capital stock paid in from time to time only to the acquisition of property, or to the payment of dividends, and were not by any of the terms of said charter authorized to divert to any officer of the company any portion of such profits, surplus or earnings by way of profit participation; (2) because under the General Corporation Laws of New Jersey profit participation by officers or employees of any New Jersey corporation was not legal prior to the passage of Chapter 175 of the Public Laws of 1920, which

by Sub-section b of Section 1 for the first time provided for a participation by all or any of the employees of a New Jersey corporation in the profits of the corporate enterprise; (3) because the charter of the defendant company expressly provided that the power to make and alter by-laws of said company was conferred on the directors thereof, and the stockholders had no power to adopt the [fol. 18] said by-law; (4) because the notice of the meeting at which said by-law is claimed to have been adopted by the shareholders (a) did not specify the officers to whom such profit participation was to be paid; (b) did not specify that the profit participation was to be paid to officers as salary for the year in addition to fixed salaries; and (c) did not state that the profit participation was to be continued beyond the year when adopted.

13. The plaintiff further alleges since the said by-law was adopted or attempted to be adopted by the stockholders, the stockholders have added to the capital of the company over $113,000,000, of which approximately $65,000,000 was contributed from surplus earnings of said company between 1912 and 1931, and $48,822,875 from a subscription by them to 390,583 shares of Common Stock B as of October 1, 1929; that even if valid when adopted the measure of compensation fixed by said by-law is not now equitable or fair; and if applied would result in a total compensation to the respective individual defendants, exclusive of special cash credits and profits from the purchase of the shares of stock at $25 a share heretofore referred to, but including fixed salary, for the year 1930, the last year for which definite figures are available, as follows:

Defendant	Hill, President	$1,010,507.72
"	Penn, Vice-President	603,504.63
"	Mower, Vice-President	555,504.63
"	Neiley, Vice-President	459,495.25
"	Riggio, Vice-President	459,494.25

[fol. 19] If the special credits referred to in paragraph 7 and the reasonable value of the stock allotments referred to in paragraph 8 of this complaint be taken into account, estimating the stock profit at $100 a share, the difference between $25 a share, the price at which it was allotted to the individual defendants by the President and directors

of the company, and $125 a share, its approximate current market price, the total of all compensation paid to and claimed as lawful by the individual defendants for the year 1930 was as follows:

Hill	$2,627,978.48
Penn	1,587,712.75
Mower	746,358.69
Neiley	849,440.77
Riggio	950,349.31

14. In a letter addressd by plaintiff prior to the institution of this suit he made a wrtten demand on the defendant, The American Tobacco Company, to institute action against the individual defendants, among other officers of said company, to require them to account to the company for any excess of salaries or other profit participation paid them over and beyond such amount as the court might find to be reasonable for the years herein included, a copy of which letter is annexed hereto and made a part hereof as Exhibit D; and that thereafter the said company by a letter addressed to plaintiff, a copy of which is annexed hereto as Exhibit E, declined to bring such suit.

[fol. 20] 15. The plaintiff further avers that the various payments made under said by-law XII to the individual defendants herein were never disclosed to the stockholders of the said company by any official or other communication prior to February, 1931, when the plaintiff as a stockholder made an application to the Supreme Court to examine the books of the said company with respect to salaries and other benefits or payments made by said company to its officers, directors and employees, and that prior to said date he had no knowledge thereof.

16. Plaintiff avers (1) that the profit participation paid to the individual defendants under the aforesaid by-law is illegal and void and a waste of corporate assets; (2) that if not illegal, because of the original invalidity of said by-law, that such profit sharing when added to their fixed salaries for the year 1929 and 1930 renders their total compensation exorbitant, excessive, and to the extent that such total compensation exceeds a reasonable and fair salary for the services performed by said individual defendants,

it is a waste of corporate assets to the detriment of this plaintiff and all other stockholders of defendant company; that unless enjoined the defendant company for the current year and all future years will continue to pay to said individual defendants and their successors in office compensation, in addition to their fixed salaries, of 2½% in the case of the President, and 1½% in the case of each of the five Vice-Presidents of all of the profits of the company in excess of $11,369,000 per annum as provided by the terms of said by-law, to the irreparable injury of this plaintiff and all other stockholders of defendant company.

[fol. 21] 17. The amount involved in this suit is more than $3,000, exclusive of costs and interest, and it is not collusive for the purpose of conferring jurisdiction on this Court.

The plaintiff therefore prays (1) that the by-law XII be declared to be illegal, ultra vires and void and not binding on the defendant The American Tobacco Company; (2) that said defendant be enjoined from making any further payments to the individual defendants or their successors in office thereunder; (3) that the individual defendants be required to account for all sums received by them and each of them as herein set forth under and pursuant to said by-law, together with legal interest thereon from the date when received until paid; that if said by-law be held valid, the court fix and determine as an alternative measure of relief the fair and reasonable compensation of each of the individual defendants for each of the years aforesaid, and that each of the said individuals be compelled to account for and pay over to the said The American Tobacco Company the excess of such moneys, profits or benefits actually received by each of the said defendants over such sum as the Court in the case of each of the said defendants may fix as his reasonable compensation as an officer of the said company for each of said years, together with interest thereon; (4) that the said, The American Tobacco Company, its officers, agents and employees be enjoined from thereafter paying to all or any of the said individual defendants or their successors in office any consideration in whatsoever form over and beyond the sums that may be fixed by the Court as reasonable compensation for their [fol. 22] services as officers; (5) that the Court award to

the plaintiff the costs of this action and reasonable counsel fees; (6) and that the Court accord this plaintiff such other and further relief as he, and all other stockholders of said company, may be entitled to.

Richard Reid Rogers, Plaintiff, in sua Persona.
Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.

[fol. 23] EXHIBIT A TO AMENDED COMPLAINT

Copy of Resolution as Passed at Annual Meeting of Stockholders Held March 13, 1912

Mr. J. T. Wilcox proposed the addition of a new Article to the By-Laws as follows:

Article XII

Section 1. As soon as practicable after the end of the year 1912 and of each year of the company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-fourth thereof or 2½ per cent of such amount to the President; one-fifth of the remainder thereof or 1½ per cent of such amount to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of [fol. 24] such vacancy shall be returned into general profit of the company. If there shall be a change during the year

in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes or little cigars, except earnings on preference shares of British American Tobacco Company Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland) Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to ques- [fol. 25] tion the said declaration, or to any examination of the books or accounts of the Company and nothing herein contained shall give any incumbent of any office any right to claim to continue therein or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

Mr. R. J. Boylan seconded such addition to the By-Laws and on being put to a vote such addition to the By-Laws received in its favor the vote of 621,047 shares of stock and the vote of 35 shares of stock was cast against such addition, this vote being made up as follows: All of the Stock represented at the meeting voted in favor of the amend-

ment with the exception of the following which voted against it:

Claudia M. Etting ..... 25 shares Preferred.

and the following which was not voted either for or against:

Lincoln Trust Company Trustee for:

	Com.	Pref.
Julia G. Gayley	50	133
Ruth Alice Halliwell	1,150	
Walter S. Halliwell	1,150	

The Chairman thereupon declared the resolution adopted, and the addition to the By-Laws of Section XII as hereinbefore set out, duly authorized and directed.

[fol. 26] EXHIBIT B TO AMENDED COMPLAINT

Notice of Annual Meeting

No. 110 First Street,
Jersey City, N. Y., February 21, 1912.

Notice is hereby given that the Annual Meeting of the Stockholders of The American Tobacco Company, and an election for Directors thereof, will be held at the office of the Company at 110 First Street, Jersey City, N. J., at eleven o'clock in the forenoon of Wednesday, March 13th.

At this meeting there will be presented for consideration, and action upon, a proposed by-law providing for participation by certain officers of the Company in profits, if any, earned by the Company in excess of profits earned during the year 1910 on the brands and businesses now owned by the Company, not exceeding in the aggregate 10% of such excess.

The preferred and common stock transfer books will be closed from 3 P. M., February 21st, 1912, to 10 A. M., March 14th, 1912.

Josiah T. Wilcox, Secretary.

(If unable to be present at the meeting, kindly sign the enclosed proxy, have your signature witnessed, and return as promptly as possible.)

[fol. 27] EXHIBIT C TO AMENDED COMPLAINT

Agreement and By-Laws

Agreement

An agreement made and entered into this ninth day of September, in the year nineteen hundred and four, between The American Tobacco Company, a corporation of the State of New Jersey, by its directors; Consolidated Tobacco Company, a corporation of said State of New Jersey, by its directors, and Continental Tobacco Company, a corporation of said State of New Jersey, by its directors:

Whereas, the principal and registered office of each of said corporations in the State of New Jersey is at No. 104 First Street, in the City of Jersey City, County of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against each of said corporations may be served within said State; and

Whereas, said The American Tobacco Company was organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof; and the said Consolidated Tobacco Company and Continental Tobacco Company were organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto [fol. 28] and acts amendatory thereof; and all of said Corporations were organized for the purpose of carrying on business of a similar nature, to wit: the manufacture and sale of tobacco and the products thereof; and

Whereas, the respective Boards of Directors of the said corporations deem it advisable, for the purpose of greater efficiency and economy of management as well as for the general welfare of the said corporations, to merge and consolidate them under and pursuant to the provisions of said act entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof;

Now, therefore, in consideration of the premises and of the mutual agreements, covenants, provisions and grants herein contained, it is hereby agreed by and between the said parties hereto, as follows:

Article I. The said The American Tobacco Company, the said Consolidated Tobacco Company, and the said Continental Tobacco Company, are hereby consolidated into a single corporation, under the name of "The American Tobacco Company" (hereinafter called the "merged corporation").

Article II. The said merged corporation, in addition to the powers conferred by Section 1 of the Act Concerning Corporations (Revision of 1896), shall have the powers herein set out, and said merged corporation shall be subject to the limitations on said powers herein set out, to wit: [fol. 29] To dry, and cure, leaf tobacco, and to buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; to construct or otherwise acquire and hold, own, maintain and operate warehouses, factories, offices and other buildings, structures and appliances for the drying, curing, storing, manufacture, sale and distribution of tobacco and its products; to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder, and to indorse or otherwise guarantee the principal and interest, or either, of any bonds, securities or other evidence of indebtedness created by any corporation in which said merged corporation has such an interest, provided that authority for any such indorsement or guaranty be first given by resolution adopted by vote of at least two-thirds of the whole Board of Directors of said merged corporation; to carry on any business operations deemed by said merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; but nothing herein set forth is to be construed to authorize the formation hereby of an insurance, safe deposit or trust company, banking corporation or savings bank or corporation deemed to possess any of the power prohibited to corporations formed under the statutory provisions aforesaid; to conduct business in all States, Territories, Possessions and Dependencies of the United States

of America, and in all foreign countries, and to have one or more offices out of the State of New Jersey, and to hold, [fol. 30] purchase, mortgage and convey real and personal property out of said State as well as therein; the said merged corporation shall have power to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or of any bonds, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other State or government, and to issue its own obligations in payment or in exchange therefor, or for any purpose of its incorporation, and to secure such obligations by pledge or mortgage under deed of trust or otherwise of the shares of capital stock or bonds, securities or other evidences of indebtedness so acquired, or of any property of the corporation. The power to make and alter by-laws of said merged corporation is conferred upon the directors. The directors of said merged corporation may hold their meetings and have an office and keep the books of the corporation (except the stock and transfer books) in the City of New York or elsewhere outside of the State of New Jersey. The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital [fol. 31] stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine, and neither the property so acquired nor any of its capital stock held by the corporation shall be regarded as accumulated profits, for the purpose of declaration or payment of dividends, unless otherwise determined by the directors. In case of any increase in the number of directors of said merged corporation, pursuant to its by-laws, which may provide for such increase by vote of the directors, vacancies in the board shall be deemed to be thereby created which the existing directors shall have the power to fill until the next

election by stockholders, or until successors shall be otherwise chosen. The by-laws of said merged corporation may prescribe the number necessary to constitute a quorum of the directors, which may be less than a majority of the directors. No period is limited for the duration of said corporation, but its existence shall be perpetual.

Article III. The Board of Directors of said merged corporation shall be twenty-eight in number, and the names and places of residence of the first directors and officers thereof, who shall hold office until their successors are chosen or appointed as provided by the by-laws of said merged corporation, are as follows:

[fol. 32] Directors

George Arents	104 First Street, Jersey City, N. J.
Anthony N. Brady	104 First Street, Jersey City, N. J.
Paul Brown	104 First Street, Jersey City, N. J.
John B. Cobb	104 First Street, Jersey City, N. J.
Thomas Dolan	104 First Street, Jersey City, N. J.
Benjamin N. Duke	104 First Street, Jersey City, N. J.
James B. Duke	104 First Street, Jersey City, N. J.
Caleb C. Dula	104 First Street, Jersey City, N. J.
Robert B. Dula	104 First Street, Jersey City, N. J.
Charles E. Halliwell	104 First Street, Jersey City, N. J.
William R. Harris	104 First Street, Jersey City, N. J.
George A. Helme	104 First Street, Jersey City, N. J.
Percival S. Hill	104 First Street, Jersey City, N. J.
Herbert D. Kingsbury	104 First Street, Jersey City, N. J.
Pierre Lorillard	104 First Street, Jersey City, N. J.
Thomas J. Maloney	104 First Street, Jersey City, N. J.
William H. McAlister	104 First Street, Jersey City, N. J.
Rufus L. Patterson	104 First Street, Jersey City, N. J.
Oliver H. Payne	104 First Street, Jersey City, N. J.
Frank H. Ray	104 First Street, Jersey City, N. J.
Thomas F. Ryan	104 First Street, Jersey City, N. J.
Grant B. Schley	104 First Street, Jersey City, N. J.
Robert A. C. Smith	104 First Street, Jersey City, N. J.
Robert K. Smith	104 First Street, Jersey City, N. J.
Charles N. Strotz	104 First Street, Jersey City, N. J.
George W. Watts	104 First Street, Jersey City, N. J.
Harry Weissinger	104 First Street, Jersey City, N. J.
Peter A. B. Widener	104 First Street, Jersey City, N. J.

Officers

President ..... James B. Duke
104 First Street, Jersey City, N. J.

Vice-President ..... John B. Cobb
104 First Street, Jersey City, N. J.

Vice-President ..... Caleb C. Dula
104 First Street, Jersey City, N. J.

Vice-President ..... Charles E. Halliwell
104 First Street, Jersey City, N. J.

Vice-President ..... William R. Harris
104 First Street, Jersey City, N. J.
[fol. 33] Vice-President ..... Percival S. Hill
104 First Street, Jersey City, N. J.
Secretary ..... William H. McAlister
104 First Street, Jersey City, N. J.
Assistant Secretary ..... Josiah T. Wilcox
104 First Street, Jersey City, N. J.
Assistant Secretary ..... Charles K. Faucette
104 First Street, Jersey City, N. J.
Treasurer ..... John M. W. Hicks
104 First Street, Jersey City, N. J.

As Amended January 8, 1912; March 19, 1917; January 7, 1918; September 16, 1920; November 26, 1924; September 3, 1930

Article IV. The capital stock of the said merged Company is $204,010,600. Five Hundred Forty Thousand, One Hundred and Six (540,106) shares shall be Preferred Stock of the par value of $100 each. Two Million (2,000,000) shares shall be Common Stock of the par value of $25 each, and Four Million (4,000,000) shares shall be Common Stock B of the par value of $25 each. The rights of the holders of the said Preferred Stock, Common Stock and Common Stock B, respectively, shall be as follows: The holders of the Preferred Stock shall be entitled to four votes for each share of the par value of $100 held by them, and the holders of the Common Stock shall be entitled to one vote for each share of the par value of $25 held by them, but the holders of Common Stock B shall be entitled to no voting rights. The holders of the Preferred Stock shall be entitled to receive out of the surplus or out of the net profits, and the merged corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of, but never exceeding, six per centum per annum, cumulative, from and after the 1st day of October, 1904, payable yearly, half yearly, or quarterly, [fol. 34] before any dividend shall be set apart or paid on the Common Stock or Common Stock B; provided, however, that when all accrued dividends on the Preferred Stock have been paid, the Directors shall, if in their judgment the surplus or the net profits, after deducting the

amount of dividends to accrue on the Preferred Stock during the current year, shall be sufficient for such purpose, have power in their discretion to declare and pay a dividend, or dividends, on the Common Stock and Common Stock B. The Common Stock and Common Stock B, with respect to each share of either outstanding, shall have equal rights in the matter of dividends. In case of liquidation, or dissolution, or distribution of assets of the said merged corporation, the holders of Preferred Stock shall be paid the par amount of their Preferred shares and the amount of dividends accumulated and unpaid before any amount shall be payable or paid to the holders of the Common Stock or the Common Stock B; the balance of the assets of said merged corporation shall be divided ratably among the holders of the Common Stock and the Common Stock B, share and share alike, without distinction between shares of the Common Stock and the Common Stock B.

Article V. The said corporations are merged and consolidated upon the understanding and agreement that the present indebtedness of each of said corporations shall be assumed in full by the said merged corporation.

Article VI. All property, real, personal and mixed, of the said corporations, parties hereto, shall vest in the said [fol. 35] merged corporation immediately upon the adoption of this agreement by the stockholders of the said corporation, as provided by the provisions of the said act entitled "An Act Concerning Corporations (Revision of 1896)" and the several supplements thereto and acts amendatory thereof; but if the said merged corporation shall deem or be advised that any further assignments, assurances in the law, or things are necessary or desirable to vest the title to such property in the said merged corporation, the said corporations parties hereto shall execute and do all such assignments, assurances in the law, and things necessary to vest title to such property in said merged corporation, and otherwise to carry out the purposes of this agreement.

Article VII. The capital stock of each of the said corporations parties hereto shall be converted into the common stock, the preferred stock or the obligations of said merged corporation, and the common stock, preferred stock and obligations of said merged corporation shall be apportioned

among the stockholders of the said corporations, parties hereto, according to the shares held by the respective stockholders of said corporations, and shall be delivered to them upon the surrender of their certificates of stock, as follows:

There shall be apportioned to each of the holders of the eight per cent preferred non-cumulative stock of the said The American Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of the said merged corporation of one hundred and thirty-three dollars, thirty-three [fol. 36] and one-third cents ($133.33⅓) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation in the City of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable to the holder of such bond or obligation, or to the holder of a coupon representing such interest, at said office or agency in like gold coin, semi-annually on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall along with the bonds provided for in the next paragraph hereof constitute a first charge upon the income and property of the merged corporation. There shall also be paid to the holders of said preferred stock of said The American Tobacco Company, party hereto, in lieu of dividend, an amount in cash equal to two dollars for each share of said preferred stock held by him.

There shall be apportioned to each of the holders of the seven per cent non-cumulative preferred stock of said Continental Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of said merged corporation for one hundred and sixteen dollars, sixty-six and two thirds cents ($116.66⅔) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation, in the City of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable [fol. 37] to the holder of such bond or obligation, or to the holder of a coupon representing such interest, at said office

or agency in like gold coin, semi-annually, on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall, along with the bonds provided for in the next preceding paragraph, constitute a first charge upon the income and property of the merged corporation. The holders of the said preferred stock of said Continental Tobacco Company, party hereto, shall also be entitled to receive and enjoy the dividend of one and three-quarters (1¾%) per centum already declared on said preferred stock payable October 3, 1904.

There shall be apportioned to each of the holders of the common stock of said The American Tobacco Company, party hereto, for each two shares of said common stock of the par value of $50 each held by him, one share of the common stock of said merged corporation.

There shall be apportioned to each of the holders of the common stock of said Continental Tobacco Company, party hereto, for each share of said common stock of the par value of $100 held by him, one share of the common stock of the said merged corporation.

There shall be apportioned to each holder of the stock of said Consolidated Tobacco Company, party hereto, for each share of said stock of the par value of $100 held by him, one share of the common stock of said merged corporation.

By the act of merger the stocks of all the companies parties hereto held by any of the companies parties hereto shall stand and be canceled.

[fol. 38] The preferred stock of the merged corporation herein provided for, may be issued for the redemption and retirement at par of debts that by the act of merger become the debts of said merged corporation, and such preferred stock shall be issued only for such redemption or at par for cash to be used in such redemption.

Article VIII. The Morton Trust Company of the City of New York is hereby appointed the Transfer Agent of the stock and obligations of the said merged corporation in the City of New York, and the Farmers' Loan and Trust Company, of the City of New York, is hereby appointed Registrar of the stock of said merged corporation; and any stockholder of any of the said corporations parties hereto, upon presenting to the said Transfer Agent his certificate of

stock and surrendering the same to be canceled, shall be entitled to receive a certificate for the proper number of shares of the capital stock of said merged corporation, or to the bond or obligation of said merged corporation, pursuant to Article VII of this agreement.

Article IX. The said merged corporation shall pay all expenses of consolidation and all preliminary expenses, including legal expenses.

Article X. The principal and registered office of said merged corporation in the State of New Jersey is at No. 104 First Street, City of Jersey City, County of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against said merged corporation within the State of New Jersey may be served.

[fol. 39] In witness whereof the said parties to this agreement have in pursuance of a resolution passed by the Board of Directors of each of the said corporations, at a regular meeting of the Board of Directors of each of said corporations, at which a quorum was present, caused the respective corporate seals of said corporations to be hereto affixed and these presents to be signed by their respective Presidents or First Vice-Presidents and attested by their respective Secretaries all duly authorized thereto, the day and year first above written.

The American Tobacco Company, by Percival S. Hill, First Vice-President. Attest: Charles N. Strotz, Secretary. (Seal.) Consolidated Tobacco Company, by James B. Duke, President. Attest: Charles S. Keene, Secretary. (Seal.) Continental Tobacco Company, by Charles E. Halliwell, First Vice-President. Attest: William H. McAlister, Secretary. (Seal.)

[fol. 40] State of New Jersey,
County of Hudson, ss:

I, Charles N. Strotz, Secretary of The American Tobacco Company, a corporation organized and doing business pursuant to the provisions of an act of the legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof; do hereby

certify in accordance with the provisions of Section 105 of "An Act Concerning Corporations (Revision of 1896)":

1. That the foregoing agreements for the merger and consolidation of said corporation and the Continental Tobacco Company and Consolidated Tobacco Company was made by the directors of said The American Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said The American Tobacco Company at a meeting thereof held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting, and a note of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds [fol. 41] of the shares of the capital stock of said The American Tobacco Company voted in favor of the adoption of said agreement.

4. That the meeting of stockholders of The American Tobacco Company and the said vote by ballot upon the adoption of said agreement, were held and taken separately from the meetings of stockholders and votes of the said Continental Tobacco Company and Consolidated Tobacco Company.

5. That the principal office of said The American Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

In witness whereof I have hereunto signed my name as Secretary, and affixed the seal of the said The American Tobacco Company, this 19th day of October, 1904.

Charles N. Strotz, Secretary. (Seal.)

[fol. 42] State of New Jersey,
County of Hudson, ss:

I, Charles S. Keene, Secretary of Consolidated Tobacco Company, a corporation organized and doing business pur-

suant to an act of the legislature of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," do hereby certify in accordance with the provisions of Section 105 of said act:

1. That the foregoing agreement for the merger and consolidation of said corporation and The American Tobacco Company and the Continental Tobacco Company was made by the directors of said Consolidated Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said Consolidated Tobacco Company at a meeting thereof held October 17, 1904, the same being an adjourned meeting of a meeting held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said shareholders.

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said Consolidated Tobacco Company voted in favor of the adoption of said agreement.

[fol. 43] 4. That the meeting of stockholders of Consolidated Tobacco Company and the said vote by ballot upon the adoption of said agreement were held and taken separately from the meetings of stockholders and votes of the said Continental Tobacco Company and The American Tobacco Company.

5. That the principal office of said Consolidated Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

In witness whereof I have hereunto signed my name as Secretary, and affixed the seal of the said Consolidated Tobacco Company, this 19th day of October, 1904.

Charles S. Keene, Secretary. (Seal.)

[fol. 44] STATE OF NEW JERSEY,
County of Hudson, ss:

I, William H. McAlister, Secretary of Continental Tobacco Company, a corporation organized and doing business pursuant to an act of the legislature of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," do hereby certify, in accordance with the provisions of Section 105 of said act:

1. That the foregoing agreement for the merger and consolidation of said corporation and The American Tobacco Company and Consolidated Tobacco Company was made by the directors of said Continental Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said Continental Tobacco Company at a meeting thereof held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said Continental To-
[fol. 45] bacco Company, voted in favor of the adoption of said agreement.

4. That the meeting of stockholders of Continental Tobacco Company and the said vote by ballot upon the adoption of said agreement were held and taken separately from the meetings of stockholders and votes of the said Consolidated Tobacco Company and The American Tobacco Company.

5. That the principal office of said Continental Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

In witness whereof I have hereunto signed my name as Secretary and affixed the seal of the said Continental Tobacco Company, this 19th day of October, 1904.

William H. McAlister, Secretary. (Seal.)

Endorsed

"Filed and Recorded, Oct. 19, 1904.

S. D. Dickinson, Secretary of State.

[fol. 46] State of New Jersey, Department of State

I, S. D. Dickinson, Secretary of the State of New Jersey, do hereby certify that the foregoing is a true copy of Agreement of Merger and Consolidation between The American Tobacco Company, Consolidated Tobacco Company, and the Continental Tobacco Company, as the same is taken from and compared with the original, filed October 19, 1904, and now remaining on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed my Official Seal at Trenton, this Twenty-sixth day of October, A. D. 1904.

S. D. Dickinson, Secretary of State." (Seal.)

[fol. 47] By-Laws of the American Tobacco Company, Adopted Oct. 20, 1904, with all Amendments up to December 31, 1930

Article I

Directors

Section 1. The number of the directors of this Company is fixed at seventeen, who shall be annually elected and shall hold office until the next following annual meeting of stockholders, or until their successors are duly elected and qualified.

Section 2. The number of the directors may be altered at any time by vote of a majority of the directors at any regular or special meeting.

Section 3. A stockholder need not hold more than one share of the stock of the corporation to qualify him to be a director.

Section 4. Vacancies among the directors shall be filled by vote of the remaining directors at any regular or special meeting of the Board.

Section 5. The directors may hold their meetings and have an office and keep the books of the corporation (ex-
[fol. 48] cept the stock and transfer books) in the City of New York, or elsewhere outside of the State of New Jersey.

Section 6. If for any reason the Guaranty Trust Company of New York, of the City of New York, should cease to be transfer agent of the stock and obligations of the corporation, or The Farmers' Loan & Trust Company, of the City of New York, the registrar of the stock of the corporation, or if for any reason it shall be desired to make a change as to either or both, the directors may appoint another as transfer agent in the room and stead of the Guaranty Trust Company of New York, and another as registrar in the room and stead of The Farmers' Loan & Trust Company, as the case may be.

Article II

Meetings of Stockholders

Section 1. The annual meeting of the stockholders of the corporation for the election of directors, and such other business as may properly come before the meeting, shall be held at the principal office of the Company in Jersey City, on the first Wednesday of April, at eleven o'clock in the forenoon, or at such hour as the directors shall appoint before notice of the meeting is given.

Section 2. Special meetings of the stockholders, to be held at the principal office of the Company in New Jersey, may be called by the directors for such purpose as shall be specified by resolution.

[fol. 49] Section 3. Due notice of each annual meeting of the stockholders shall be given by a written or printed notice signed by the Secretary of the Company and mailed, postage prepaid, at least twenty days prior to such meeting, to each stockholder of record entitled to vote thereat, appearing on the books of the Company at the address given thereon, and public notice of the time and place of

holding such meeting shall be published not less than once a week for two successive weeks previous thereto in a daily newspaper of general circulation, published in the City of New York.

Due notice of each special meeting shall be given also in the manner above provided. The notice shall state the object of the special meeting, and no other business shall be transacted at such meeting; but this provision shall not apply to annual meetings, at which any business may be transacted without notice of the object of such annual meeting.

Section 4. The President of the corporation, if present, shall call to order, and preside at, all meetings of the stockholders, whether general or special, and the Secretary of the corporation (or in his absence any Assistant Secretary) shall be the Secretary of such meeting; if the President is absent, any Vice-President shall preside. If the President and all the Vice-Presidents are absent, the meeting shall be presided over by the person designated in writing by the President, or any one of the Vice-Presidents. If the President and all the Vice Presidents are absent, and no one designated by the President or any of the Vice-Presidents is present, the meeting may call any stockholder [fol. 50] of record who is entitled to vote for directors, or any person present holding a proxy for such stockholder, to preside. In the absence of the Secretary and Assistant Secretaries, any person may be selected by the meeting to act as Secretary of the meeting.

Section 5. Any voting proxy given by a stockholder must be in writing, signed by the stockholder.

Section 6. Less than a quorum of the stockholders may adjourn any stockholders' meeting.

Section 7. The directors may appoint two inspectors of the annual election at any time before notice of the meeting at which such election is held.

Article III

Meetings of Directors

Section 1. Regular meetings of the directors shall be held at the office of the Company in the City of New York,

on Wednesday of each week. Meetings shall be held at eleven o'clock in the forenoon, except that meetings on the last Wednesday of each month shall be held at four fifteen o'clock in the afternoon. Special meetings may be held as determined by the directors, and may be called by the President at any time and shall be called by him on the request of three directors.

Section 2. No notice need be given of regular meetings of the directors. Reasonable notice shall be given of special meetings; but notice of a meeting may be admitted or waived by all the directors.

[fol. 51] Section 3. At any meeting five directors shall constitute a quorum.

Article IV

Officers

Section 1. The directors shall annually choose from their own number a President and not more than five Vice-Presidents, and shall annually choose a Secretary and a Treasurer, who need not be directors.

Section 2. The directors may elect a Comptroller, an Auditor and other officers and define their powers and duties.

Section 3. Any two offices not inconsistent with each other may be held by the same person.

Section 4. All officers elected by the directors shall hold office, subject to removal by the directors, until their successors are chosen and qualified.

Section 5. All agents and employees shall be appointed and may be removed by the President, subject to the control of the directors.

Section 6. Vacancies among officers of the corporation shall be filled as soon as practicable by vote of the directors at any regular or special meeting.

Section 7. The President, if present, shall preside at the meetings of directors, and shall have the management of

[fol. 52] the Company's affairs, subject to the control of the directors.

Section 8. The Vice-Presidents shall have such powers and perform such duties as shall at any time be delegated to them by the directors, and in the absence or disability of the President, one of them shall perform the duties of his office, subject to the control of the directors.

Section 9. The Secretary shall give the requisite notice of meetings of stockholders and directors, and shall record the proceedings of such meetings, and besides his powers and duties prescribed by law, shall have such other powers and perform such other duties as shall at any time be required of him by the directors.

Section 10. The Secretary shall have the custody of the seal of the corporation and of the books and papers, except those pertaining to the office of Treasurer.

Section 11. The Assistant Secretaries shall assist the Secretary in the discharge of his duties and shall have such powers and perform such other duties as shall at any time be delegated to them by the directors, and in the absence or disability of the Secretary, shall perform the duties of his office, subject to the control of the directors.

Section 12. The Treasurer shall have charge of the funds and securities of the corporation, and shall keep and deposit the same as required by the directors, and shall keep proper books of account of all receipts and disbursements [fol. 53] and official transactions of the corporation, and shall render statements of his accounts as required by the President or the Directors.

Section 13. The Treasurer shall give a bond in such sum and with such surety or sureties as shall be required by the directors for the faithful discharge of his duties.

Section 14. The Assistant Treasurer shall assist the Treasurer in the discharge of his duties and shall have such powers and perform such other duties as shall at any time be delegated to him by the Directors; and in the absence or disability of the Treasurer, shall perform the duties of his office subject to the control of the directors.

Section 15. Any other officer, agent or employee of the corporation may be required to give such security for the faithful performance of his duties as shall be determined by the directors, who shall also determine the custody of any security given.

Article V

Salaries

Section 1. The salaries of all officers elected by the directors shall be fixed by the directors.

Section 2. Salaries of all other agents and employees shall be fixed by the President, subject to the control of the directors.

[fol. 54]

Article VI

Seal

Section 1. The seal of the corporation shall be used and attested only as directed by the President or by the directors.

Article VII

Payments

Section 1. All claims against the corporation shall, so far as practicable, be paid by checks drawn or indorsed to the order of the person having the claim.

Section 2. All checks or bank drafts shall be signed by any two of the following named officers: President, any Vice-President, Secretary, any Assistant Secretary, Treasurer, Assistant Treasurer; and in such other manner as the Directors may from time to time designate.

Section 3. All notes or other obligations and contracts shall be signed by the President, or a Vice-President and the Secretary, or an Assistant Secretary, or the Treasurer, or an Assistant Treasurer.

Article VIII

Capital Stock

Section 1. Certificates of the capital stock of the corporation shall be issued for one or more full shares duly num-

[fol. 55] bered and registered in the order of their issue and shall be in the form the directors shall prescribe.

Section 2. The capital stock shall be transferable on the transfer books of the corporation, subject to these By-Laws, by the owner in person, or by attorney or legal representative, written evidence of whose authority shall be filed with the corporation.

Section 3. No transfer of capital stock can be required except upon surrender and cancellation of the certificate representing the same.

Section 4. The Board of Directors shall have power to close the stock transfer books for a period not exceeding twenty days, preceding the date of any meeting of the stockholders or at other times and for other purposes; or in lieu of closing the transfer books, the Board of Directors may fix in advance a date, not exceeding twenty days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, or entitled to receive payment of any such dividend or any such allotment of rights, or to exercise the rights in respect to any such change, conversion or exchange of capital stock; and in such case stockholders of record on the date so fixed shall be exclusively entitled to such notice of and vote at such [fol. 56] meeting or at any adjournment thereof, or to receive payment of such dividend or allotment of rights, or exercise such rights, as the case may be, and not withstanding any transfer of any stock on the books of this Company after any such record date fixed as aforesaid.

Article IX

Penalties

Section 1. No director or officer of this Company shall, during his term of office, engage directly or indirectly in any business similar to that in which this Company is or is to be engaged, or in the manufacture or sale of any supplies for or connected therewith, without the consent of two-thirds of the directors of the Company.

Any violation of this provision shall be treated by the Board of Directors, after notice to the offender, as a vacation of his office, and his successor shall be thereupon duly elected; and the offender shall, in addition, be subject to a penalty of twenty dollars, and to such damages as can be legally collected.

Article X

Dividends

Section 1. Dividends upon the six per cent cumulative preferred stock of the Company, payable out of the accumulated profits of the Company in excess of such sum, if [fol. 57] any, as shall have been reserved as a working capital, shall be declared by the directors so as to be payable on the first business day of January, April, July and October in each and every year, such declaration to be at least fifteen days before the time of payment. When all accrued dividends on the preferred stock have been paid, the directors shall, if in their judgment the surplus or net profits in excess of such sum as shall have been reserved as a working capital, and after deducting the amount of dividends accrued or accruing on the preferred stock during the current year, shall be sufficient for such purpose, have power to declare so as to be payable on the first business day of March, June, September and December in each and every year, a dividend on the common stock and common stock B of the Company, such declaration to be at least fifteen days before the time of payment; and the directors may declare such dividends at other times, and payable at other times, upon the conditions just hereinbefore provided.

Article XI

Amendments

Section 1. These By-Laws may be added to, altered, repealed or suspended at any regular or special meeting by a majority vote, at which not less than one-third of all the directors are present.

Article XII

Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations

[fol. 58] thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent of such amount, to the President; one-fifth of the remainder thereof or 1½ per cent of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of such vacancy shall be returned into the general profit account of the Company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manu-[fol. 59] facturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted, as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Company, Lim-

ited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due any-one hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company, and nothing herein contained shall give any incumbent of any office any right to claim to continue therein, or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

[fol. 60] EXHIBIT D TO AMENDED COMPLAINT

March 12, 1931.

DEAR SIRS: I am now advised that under By-law XII, said to have been adopted by the stockholders in 1912, a sum equal to 10% of the net earnings of The American Tobacco Company for the year 1910 and dividends on the preferred stock, has been paid to the President and five Vice-Presidents of the company for such year since 1912 under the guise of additional salary for such year, in addition to their fixed salaries, in the following proportions: 2½% to the President, and 1½% to each of the Vice-Presidents.

From a statement of the net earnings of the company for the years from 1926 to 1930, inclusive, contained in an affidavit of your Vice-President, Mr. Charles F. Neiley, I gather that this distribution during the past seven years alone has exceeded the sum of $10,700,000.

Inasmuch as these payments were exorbitant and illegal in whole or in part, I demand that within ten days you institute suit against the officers who have received these bonuses since the year 1912, or their estates, requiring them to account for the benefit of the company and its stockholders for all or such part thereof as the Court may hold to be illegal.

If I do not hear from you within the time mentioned, I shall assume that you refuse to comply with this demand.

Very truly yours, Richard Reid Rogers.

The American Tobacco Company, 111 Fifth Avenue, New York, N. Y.

[fol. 61] EXHIBIT E TO AMENDED COMPLAINT

The American Tobacco Company, Incorporated, 111 Fifth Avenue, New York

Office of the Secretary

March 19, 1931.

Mr. Richard Reid Rogers, 74 Trinity Place, New York, N. Y.

DEAR SIR: We beg to acknowledge your letter dated March 2, 1931, left at the New York office of this Company on March 13, 1913.

The advice which you say that you have that under By-law XII, "a sum equal to 10% of the net earnings of The American Tobacco Company for the year 1910 and dividends on the preferred stock, has been paid to the President and five Vice-Presidents of the Company for each year since 1912 under the guise of additional salary for such year, in addition to their fixed salaries in the following proportions: 2½% to the President, and 1½% to each of the Vice-Presidents," is erroneous.

The language of Article XII of the by-laws is as follows:

"Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the [fol. 62] sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-

fourth thereof or 2½ per cent of such amount to the President; one-fifth of the remainder thereof, or 1½ per cent of such amount to each of the five Vice-Presidents as salary for the year in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of such vacancy shall be returned into the general profit of the Company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,-[fol. 63] 459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted as the case may be, the company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes or little cigars, except earning on preference shares of British American Tobacco Company Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland) Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company and nothing herein contained shall give any incumbent of any office any right to claim to

continue therein, or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the Directors."

The records of this Company show that Article XII of the by-laws was duly adopted at a stockholders' meeting held on March 13, 1912, the vote in its favor being 621,047 shares and the vote against 35 shares, the outstanding stock of the Company at that time consisting of 949,427 shares of which 402,424 shares were shares of common stock of the par value of $100 each and 543,003 shares were shares of preferred stock of the par value of $100 each.

[fol. 64] On March 11, 1931, there was mailed to you as a stockholder a statement relative to the Employees' Stock Subscription Plan as authorized at the special meeting of Stockholders of this Company held on July 28, 1930. On page 9 of that statement will be found information relative to the above by-law. It will be noted that the 10% attached only to net profits in excess of the sum of $8,222,245.82, and in determining the net earnings there had to be deducted, among other items, an amount equal to 6% dividends on $52,459,400 of the Company 6% preferred stock, also that this Company ordinarily has income from sources other than those included in the by-law but income from such other sources is excluded and compensation under the by-law is based only upon the profits from sources included in language of the By-Law.

Your letter asserts that payments under the by-law which you characterize as bonuses were exorbitant and illegal in whole or in part and demands that within ten days the Company institute suit against the officers who received the same since the year 1912, or their estates, requiring them to account for the benefit of the Company and its stockholders for all or a part thereof as the court may hold to be illegal.

We find nothing in your letter nor in the facts as known to the Company to justify the assertions which you make. On the contrary, the payments referred to have been made under express authority of the by-law duly adopted by the

stockholders, and we are advised that the institution of a suit such as you have demanded in your letter would be without basis in law or in fact, and we therefore decline to institute suit in accordance with your demand.

Very truly yours, (Sgd.) Richard J. Boylan, Secretary.

[fol. 65] IN UNITED STATES DISTRICT COURT

E-60-94

[Title omitted]

Consolidated Cause

ANSWER OF DEFENDANTS HILL, NEILEY, RIGGIO, TAYLOR, AND THE AMERICAN TOBACCO COMPANY TO AMENDED COMPLAINT

The defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, for their answer to the amended complaint, show,

I. They admit that plaintiff was a stockholder of record of 200 shares of the Common Stock and 400 shares of the Common Stock B of The American Tobacco Company (hereinafter called the "Company") at the time of the commencement of this action, but allege that they are without knowledge as to whether he is the owner of said 200 shares [fol. 66] of the Common Stock and 400 shares of the Common Stock B of the Company, and that the 200 shares of the present Common Stock of which plaintiff is now the holder of record represent 50 shares of $100 par value Common Stock of which plaintiff was the holder of record on October 6, 1917, and they therefore deny that he was a stockholder of record of said 200 shares of the Common Stock of the Company in 1916.

II. They admit the allegations of paragraph 2 of the amended complaint.

III. They admit the allegations of paragraph 3 of the amended complaint.

IV. They admit the allegations of paragraph 4 of the amended complaint.

V. They admit that defendant Hill is a resident of New York, and from April 6, 1921 to date has been a Director of the Company, from April 6, 1921 to December 16, 1925, was a Vice-President, and from December 16, 1925 to date, President of the Company. They deny that defendant Mower is a resident of New York and allege that he is a resident of London, England, and admit he was a Director of the Company from April 6, 1921 to July 31, 1931, and one of its Vice-Presidents from April 4, 1931 to July 31, 1931, on which date he resigned both offices. They admit that Charles A. Penn was a resident of North Carolina until his death on October 22, 1931, and that he was a Director and [fol. 67] a Vice-President of the Company from April 6, 1921 to that date.

VI. They admit the allegations of paragraph 6 of the amended complaint.

VII. Answering paragraph 7, they allege that the credits therein described were for additional compensation for services rendered to the Company by the persons therein named; that such payment was within the power of the Board of Directors, who had exercised their discretion in good faith and for the best interests of the Company and its stockholders; that the compensation so paid tended to increase the efficiency, loyalty, faithfulness, activity and energy of those officers in the conduct of the business of the Company, and the services so obtained thereby resulted in a profit to the Company for the year 1930 and a distribution to stockholders for the year 1930 far exceeding that which had taken place in any previous year; that the moneys so paid together with all other compensation were not equal to the value of the services that were rendered to the Company by those persons during the period for which said compensation was paid, and that, as a result of the policy so pursued by the Directors of the Company, the payments of compensation so made have resulted in increasing the amount of the Company's business, the amount of the Company's profits, the amount of distribution to the Company's stockholders, the amount of its reserve and surplus during [fol. 68] a period when most of the corporations in the United States were meeting with decreased business, decreased profits, decreased payments to their stockholders and decreased surpluses.

VIII. Answering paragraph 8 of the amended complaint, they allege that the Employees' Stock Subscription Plan (hereinafter called the "Plan") was duly authorized by the stockholders of the Company at a meeting held on July 28, 1930, by a vote of 389,553 shares of Preferred Stock, 620,086 shares of the old Common Stock ($50 par value), and 1,218,849 shares of the old Common Stock B ($50 par value), on which date there were outstanding entitled to vote 526,997 shares of the Preferred Stock, 778,548 shares of the old Common Stock ($50 par value), and 1,535,850 shares of the old Common Stock B ($50 par value) and only 170 Common and 1,995 Common B shares and 10 Preferred shares voted against said resolution; that said Plan was duly authorized pursuant to the provisions of §§158 and 158a of the General Corporation Act of New Jersey as well as under the other laws of the State of New Jersey; that said Plan was in all respects legal and valid, and that the allotments of stock made thereunder were reasonable and proper and that such benefit therein provided together with all other compensation did not equal the value of the services rendered during the period for which the compensation was paid; that said Plan could have been and can be repealed at any time pursuant to the provisions of §158c of [fol. 69] the General Corporation Act of New Jersey; that by virtue of §46 of the General Corporation Act of New Jersey the plaintiff, if joined by any two stockholders, could have called a meeting for such purpose, but no such meeting has ever been called; that the stockholders of the Company were fully apprised prior to the annual meeting which was held on April 1, 1931, of the allotments under the Plan, to wit, on or about March 12, 1931, there was mailed to each stockholder of record a pamphlet relative to the Plan; that on April 1, 1931, the voting stockholders of more than 99% of the stock then present or represented approved the management and re-elected all the Directors.

IX. They admit the amounts set forth in paragraph 9 of the amended complaint were received, but they allege that said payments were for compensation duly earned by the persons therein described, as more fully detailed hereinafter.

X. Answering paragraph 10 of the amended complaint, they allege that Article XII of the By-Laws was duly

adopted by the stockholders of the Company on March 13, 1912; that said By-Law was duly adopted more than five years before plaintiff became a stockholder of record of the Company of any of the shares of its Common Stock of which he is now the holder of record.

XI. Answering paragraph 11 of the amended complaint, they allege that only the following defendants are now eligible to the contingent compensation provided by said [fol. 70] Article XII of the By-Laws for the year 1931, viz.: defendants Hill, Neiley and Riggio, and that the defendant Mower will be entitled to only so much of the said contingent compensation as the proportion of his service with the Company for the year 1931 bears to the whole year and that the late defendant Penn will be entitled only to such portion of the contingent compensation as the period from January 1, 1931 to the date of his death bears to the whole year.

They deny that the profits payable under By-Law Article XII for the year 1931 will exceed $5,000,000 and that such amount unless enjoined will be paid shortly after the close of the present year by the Company to its President and Vice Presidents, but they allege that the Company will pay to the defendants herein named the amount of the contingent compensation to which they are entitled in accordance with the provision of Article XII in the case of the defendant Hill and so much of the contingent compensation that the defendants Neiley and Riggio are entitled to in accordance with said By-Law and a waiver by said defendants authorizing the Company to deduct the sum of $14,692,871.24 instead of the sum of $8,222,245.82 from the net income for the year 1931 and that said payments all together will not exceed $3,000,000.

They deny that the Company's profits are running at the rate of $60,000,000 a year but allege that the volume and profits of the Company's business for the first ten months [fol. 71] of the year 1931 are greater than for the corresponding period of the year 1930 and that such increase in business and profits was due in a large measure to the efforts, ability and services rendered by the defendants as hereinafter more fully detailed.

XII. They deny each and every allegation set forth in paragraph 12 of the amended complaint; they deny that the

by-law Article XII under which the contingent compensation was paid and may hereafter be paid was or is illegal, ultra vires or void for any of the reasons set forth in paragraph 12 of the amended complaint or for any other reason whatsoever; and they allege that the moneys so paid and to be paid are by way of compensation for services rendered, that such compensation was and is and will be a legitimate expense of the operations of the Company, and in response to subdivision (1) of Paragraph 12 that there is nothing in the charter of the Company that prohibits the Company from paying to said officers said contingent compensation in accordance with said By-Law Article XII and they deny that any of said payments constitute in any manner a diversion of the profits, surplus or earnings of the Company; that in response to subdivision (2) of Paragraph 12 they allege that there is nothing in the General Corporation Laws of New Jersey or any of the laws of New Jersey that prohibits at any time the payment of compensation to officers or employees of a New Jersey corporation based upon a contingent participation in the profits of the Company and that § 158c of the General Cor- [fol. 72] poration Act of New Jersey (Chapter 175 of the Laws of 1920) provides that:

"The privileges and powers conferred by this Act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this State."

In response to subdivision (3) of Paragraph 12 they deny that the stockholders had no power to adopt said By-Law and they allege that under New Jersey law stockholders of a corporation have the right at all times to make or amend or repeal any By-Law of the Company; that the charter merely provides that

"The power to make and alter by-laws of said merged corporations is conferred upon the directors"

and did not exclude by its terms the power or right of the stockholders of the Company to make or amend by-laws.

In response to subdivision (4) of paragraph 12 they allege that the notice to stockholders of the meeting at which

said By-Law was so duly adopted by the stockholders of the Company was sufficient and complete and they allege that the notice upon its face showed that the profit participation was to continue beyond the year 1912, the year in which said By-Law was adopted.

[fol. 73] XIII. Answering paragraph 13 of the amended complaint, they deny that the measure of compensation fixed by Article XII of the By-Laws is not now equitable or fair and allege on the contrary that said measure of compensation is fair and equitable; they allege further that the stockholders could have at any time by a majority vote modified or repealed said By-Law and that a meeting for that purpose could have been called and can now be called by any three stockholders of the Company and that no such meeting has been at any time called; they deny that in determining the total compensation to be paid to the defendants the allotments of stock referred to in said paragraph 13 should be considered, because said stock was not allotted until 1931, and that title thereto cannot pass in any event until December 31, 1931, and that the difference between the market value at the time said allotment was made and the subscription price is not a measure of compensation, nor is it any proof of what the market value of said stock will be at the time that the participants are entitled to delivery of said stock, nor is the difference between the market value and the subscription price a measure of the compensation so paid to such participants. They allege that in any event the compensation, including any benefits that were or may be received under the Employees Stock Subscription Plan, did not equal the value of the services rendered by the defendants, as more fully detailed hereinafter.

[fol. 74] XIV. Answering paragraph 15 of the amended complaint, they allege that plaintiff, who became a stockholder of the Company five years after Article XII of the By-Laws was adopted by the stockholders, was bound by the provisions of that By-Law and is conclusively presumed to have knowledge thereof; that all of the stockholders of the Company could have ascertained from the annual reports submitted to them by the Company the maximum amount of compensation that could have been paid to the President and five Vice-Presidents of the Company by the

application of the formula provided for by Article XII of the By-Laws of the Company; that no statements were sent to stockholders of the amount of compensation paid to the employees of the Company, because the Directors, in their discretion, did not deem it for the best interest of the Company to advise its competitors of the amounts being paid to the different important men in the Company, because the tobacco industry is a highly competitive field in which any information affecting any company in the industry is sought by all the large corporations engaged therein; that the Directors of the Company in their discretion did not deem it advantageous to the successful operation of the Company to apprise the employees of the compensation that was being paid to the said officers, as such information would tend to make the employees dissatisfied and jealous of one another and thereby destroy the morale which the Directors were trying to maintain, which morale was essential to obtain the greatest benefit for the Company and its stockholders.

[fol. 75] XV. They allege that defendant Taylor has not been paid any compensation under Article XII of the By-Laws. They deny that the total compensation paid to the individual defendants under Article XII is illegal and void and a waste of corporate assets but allege that said compensation was legal and was a proper expenditure by the Company for the services rendered by the recipients thereof pursuant to and by virtue of the authority of the stockholders declared in the resolution of March 13, 1912; they deny that the compensations paid to the defendants for the years 1929 and 1930 were exorbitant and excessive and that they exceeded a reasonable and fair salary for the services performed by said individual defendants but allege that the services rendered by those defendants as will be hereinafter set forth were worth more to the Company than the compensation so paid to them; they deny that such total compensation is a waste of corporate assets and they deny that any payments that may be made in the future by way of compensation pursuant to the provisions of the By-Law will constitute irreparable injury to the plaintiff or any other stockholders of the Company and they allege as a result of the policy so authorized by the stockholders of the Company, the payments of compensation so made to the allottees have resulted in those allottees taking an in-

terest in the Company, its affairs and its welfare, and such payments have succeeded in increasing the amount of the Company's business, the amount of the Company's profits, the amount of distribution to the Company's stockholders, [fol. 76] the amount of its reserve and surplus during a period when most of the corporations in the United States were meeting with decreased business, decreased profits, decreased payments to their stockholders and decreased surpluses.

As a first separate defense defendants allege that

XVI. Article XII of the By-Laws of the Company was duly adopted by the stockholders of the Company at a meeting of the stockholders held on March 13, 1912, which By-Law was duly adopted by a vote in its favor of 621,047 shares and the vote against its adoption was 35 shares, the outstanding stock of the Company at that time consisting of 945,427 shares, of which 402,424 shares were Common Stock of the par value of $100 each and 543,003 shares were Preferred Stock of the par value of $100 each.

XVII. Said By-Law was duly adopted more than five years before plaintiff became a stockholder of record of the Company of any shares of its Common Stock of which he is now the holder of record.

XVIII. Said By-Law by its very provisions provided that it could be repealed by the action of the stockholders of the Company.

XIX. Plaintiff possessed the right at all times and still possesses the right, pursuant to the provisions of § 46 of [fol. 77] the General Corporation Act of the State of New Jersey (Laws of 1896, Chap. 185, § 46 thereof), to call a meeting to repeal that By-Law (provided he is joined by two other stockholders) by publishing ten days' notice of the time, place and purposes of the meeting, in a newspaper published in the county in which the Company has its principal office in the State of New Jersey, and mailing such notice to all stockholders whose post office addresses are known or can be ascertained.

XX. The defendants did not at any of the times mentioned in the complaint own or control nor do they now own or control a majority of the outstanding shares of the issued stock of the Company.

XXI. Plaintiff by this action seeks to undo what the great majority of stockholders of the Company have directed should be done, but has failed to make any effort to obtain that relief from the stockholders of the Company, even though plaintiff with two other stockholders could have called a meeting for such purpose, as hereinbefore stated, under the laws of the State of New Jersey.

XXII. By reason of the matters set forth in this defense, plaintiff has failed to comply with the provisions of Federal Equity Rule 27.

[fol. 78] As a second separate defense defendants allege that

XXIII. On April 1, 1931, the annual meeting of the stockholders of the Company was duly held in accordance with its By-Laws at Jersey City, New Jersey, to elect directors for the ensuing year.

XXIV. Prior to said meeting, to wit, on or about March 12, 1931, there was mailed to each stockholder of record of the Company a statement which directed attention, among other things, to said Article XII of the By-Laws. Annexed hereto and marked Exh. A is a copy of so much of that statement that treated of said Article XII.

XXV. Prior to said meeting, plaintiff, upon information and belief, caused to be inserted advertisements in a newspaper or newspapers circulated throughout the United States wherein he voiced his criticism of the management of the Board of Directors of the Company and the payments made under Article XII of the By-Laws and solicited proxies for the meeting to be held on April 1, 1931. Prior to said meeting, there appeared in many newspapers throughout the United States what purported to be an interview between plaintiff and reporters of various newspapers, in which interview plaintiff criticized the Board of Directors of the Company, and, upon information and belief, said interview was so given by the plaintiff for the purpose of obtaining proxies at such annual meeting.

[fol. 79] So widespread was the publicity as a result of the information that was conveyed by plaintiff to the reporters which instigated newspaper articles, editorials and other comments upon the amount of the compensation that was received and would be received by some of the defendants, that, upon information and belief, nearly all of the stockholders of the Company were not only thus fully informed as to the contingent compensation provided by Article XII of the Company's By-Laws, as indeed all of the stockholders had been informed by the aforesaid notice referred to in paragraph XXIV herein, sent to them by the Company. They were also informed by such publicity that the contingent compensation provided by Article XII of the Company's By-Laws was under attack by a stockholder.

XXVI. At the said stockholders' meeting of April 1, 1931, plaintiff was present in person. At that meeting among the candidates for election as directors were the defendants.

Plaintiff announced, prior to the balloting at that meeting, that he was voting against the election of the defendant Hill, nominating one J. J. McGlone as director in place and instead of defendant Hill (said McGlone having had no experience in the tobacco business, having been engaged for a number of years in the steamship business and for a period of about twenty years had been an official of a Steamship Company). Plaintiff stated at that meeting that he did not know the nature of said McGlone's business. [fol. 80] Upon information and belief, plaintiff voted for all of the directors so nominated, with the exception of defendant Hill.

The inspectors of election certified that there were 23,520,228 votes cast on 345,973 shares of Preferred Stock, and 20,917,723 votes cast on 1,240,750 shares of Common Stock, which votes were cast for the following as directors of the Company:

		Number of votes
Messrs.	Richard J. Boylan	2,608,401
	John K. Fletcher	2,615,973
	C. Huntley Gibson	2,615,973
	Patrick H. Gorman	2,616,035
	John G. Hager	2,615,973
	Paul M. Hahn	2,615,973

	Number of votes
Messrs. Tullis H. Harkrader	2,615,973
James B. Harvie	2,615,973
George W. Hill	2,608,201
Charles S. Keene	2,615,973
James E. Lipscomb, Jr.	2,615,973
Arthur C. Mower	2,608,401
Charles F. Neily	2,615,973
William H. Ogsbury	2,615,973
Charles A. Penn	2,608,401
Vincent Riggio	2,608,401
Thomas R. Taylor	2,608,401
J. J. McGlone	11,980

The number of votes cast for the reelection of the Board at that meeting was the largest number of votes ever cast at [fol. 81] any annual meeting in the history of the Company.

All of the candidates were elected as directors, except the said J. J. McGlone who, Mr. Rogers announced, was "intended as a replacement of Mr. George W. Hill." The act of electing those candidates was in fact a reelection of the Board of Directors which included the defendants.

XXVII. Plaintiff well knew, as did all of the stockholders who voted in favor of the reelection of the management, that unless the defendants were reelected as directors for the year 1931, their connections with the Company would have been severed thereby depriving them of the possibility of earning the additional compensation provided for by Article XII of the By-Laws.

XXVIII. By reason of the matters in this defense set forth, the stockholders of the Company, including plaintiff, have ratified the payments made to the defendants in accordance with and under the authority of Article XII of the By-Laws.

As a third separate defense defendants allege that

XXIX. The matters set forth in the amended complaint and the relief sought by the plaintiff involve matters of internal management of the Company which involve the construction of New Jersey statutes and New Jersey laws.

[fol. 82] XXX. The action entitled Richard Reid Rogers v. Hill, et al. was commenced in the Supreme Court of the

State of New York and thereafter removed to this Court. The Courts of the State of New York decline to take jurisdiction of actions which seek to regulate the internal affairs of a foreign corporation which are dependent upon the laws and direction of the Courts of the State in which such a corporation was organized.

XXXI. By reason of the matters in this defense set forth, this Court should decline to take jurisdiction of this action.

As a fourth separate defense defendants allege that as follows:

XXXII. Article XII of the By-Laws was duly adopted as hereinbefore described by the Company and its stockholders in 1912, since which time it has been in continuous operation and effect.

The Company in good faith has conducted its business in reliance upon said By-Law, and, in reliance thereon, has induced and secured the services of its prior President and Vice-Presidents as well as the services of the individual defendants, for more than nineteen years.

The individual defendants (other than defendant Taylor, who has received no compensation under the By-Law) have each continued and are now continuing in the service of [fol. 83] the Company in reliance upon the continued operation of the By-Law, and said By Law was a part of the contract of employment by which the Company secured the services of the individual defendants (other than defendant Taylor) and the individual defendants (other than defendant Taylor) rendered their services to the Company.

XXXIII. During the continued existence of said By-Law, no stockholder of the Company has initiated any intra corporate action for the purpose of repealing said By-Law, although, during the whole period that said By-Law was effective, under the laws of New Jersey any three stockholders of the Company could have called and can call a meeting of the stockholders for that purpose.

During all of said period that the said By-Law has been in effect, no stockholder has attempted to question its validity in the courts of any jurisdiction.

By reason of the matters hereinbefore in this defense set forth, plaintiff is now barred by laches and estopped from maintaining this action.

As a fifth separate defense defendants allege that

XXXIV. On July 19, 1907, the United States commenced an action against the Company, twenty-nine individual defendants, sixty-five American corporations, and two English corporations (United States v. The American Tobacco [fol. 84] Company, et al.) the object of which was to prevent the continuance of alleged violations of the first and second sections of the Anti-Trust Act of July 2, 1890.

XXXV. The principal defendant was the Company. The Government contended in its complaint that, by the control which the Company exercised over the other corporations named as defendants through either direct or indirect stock ownership, the Company had a virtual monopoly over the entire tobacco industry of the United States.

XXXVI. On May 29, 1911, the Supreme Court of the United States issued its mandate whereby the Court below was directed to ascertain and determine "upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly and in harmony with and not repugnant to the law."

XXXVII. On October 16, 1911, the defendants filed in the Circuit Court of the Southern District of New York a petition proposing a plan of dissolution of the combination pursuant to the mandate of the United States Supreme Court. After hearing objections, the Circuit Court duly entered a decree, dated November 16, 1911, which provided for (1) a division among four companies of the former domestic tobacco business of the Company and (2) the disintegration of accessory companies.

[fol. 85] XXXVIII. The decree required the Company to divide the domestic manufacturing assets and business controlled by it among four companies, to wit, The American Tobacco Company (Company), Liggett & Myers Tobacco Company (a newly formed company), P. Lorillard Company (a newly formed company), and the R. J. Reynolds Tobacco Company. The decree was estimated by the Circuit Court "to provide for a division of the then business in tobacco and its products among the various manufacturers as follows:

Division of Volume and Values of Business

	Division of volume and value of business pursuant to the decree		Percentage of business controlled by American Tobacco Company prior to decree
	Percentage in volume (lbs. or thousands)	Percentage in value	
Cigarettes:			
American Tobacco Co	37.11	33.15)	
Liggett & Myers	27.82	21.03)	
Lorillard Co	15.27	26.02)	80 (approx.)
Others never in any way connected with the combination	19.80	19.80)	
Smoking Tobacco:			
American Tobacco Co	33.08	40.53)	
Liggett & Myers	20.05	16.47)	
Lorillard Co	22.82	18.88)	
Reynolds Tobacco Co	2.66	2.73)	79 (approx.)
Others never in any way connected with the combination	21.39	21.39)	
[fol. 86] Plug Tobacco:			
American Tobacco Co	25.32	22.98)	
Liggett & Myers	33.83	37.84)	
Lorillard Co	3.73	4.64)	
Reynolds Tobacco Co	18.07	15.49)	80 (approx.)
Others never in any way connected with the combination	19.05	19.05)	
Fine-cut Tobacco:			
American Tobacco Co	9.94	13.54)	
Liggett & Myers	41.61	36.26)	
Lorillard Co	27.80	29.57)	80 (approx.)
Others never in any way connected with the combination	20.65	20.65)	
Cigars:			
American Cigar Co	6.06	8.90)	
Lorillard Co	5.72	2.88)	
American Stogie Co	1.58	1.58)	13 (approx.)
Others never in any way connected with the combination	86.64	86.64)	
Little Cigars:			
American Tobacco Co	15.43	13.41)	
Liggett & Myers	43.78	38.69)	
Lorillard Co	33.84	40.95)	93 (approx.)
Others never in any way connected with the combination	6.95	6.95)"	

[fol. 87] XXXIX. The Company met with severe competition from the newly created companies and R. J. Reynolds Tobacco Company. The latter entered the cigarette field after the disintegration of the Company. The result of that competition was to reduce the percentage of cigarettes sold by the Company, so that by 1925 the percentage of cigarettes that it sold in the United States had fallen to 21.80%.

XL. Defendant Hill together with the late defendant Penn created the Lucky Strike cigarette; the latter, who was in charge of manufacturing and was during his lifetime one of the greatest authorities upon tobacco and mechanics of manufacturing in the United States, worked out the blend and defendant Hill designed the package in which the new cigarette was to be sold.

XLI. The Lucky Strike cigarette was the first blended cigarette manufactured by the Company, which had theretofore been manufacturing and selling cigarettes made only of Virginia or Turkish tobacco.

XLII. Thereupon, and under the guidance of defendant Hill, the Company proceeded to concentrate upon the sale of the Lucky Strike cigarette.

XLIII. In December of 1925 the then President of the Company died, and in December, 1925, defendant Hill was elected to the Presidency of the Company. Under his [fol. 88] management and in cooperation with the late defendant Penn and the other members of the Board of Directors, most of whom were employes of the Company, a completely new and different policy was inaugurated in all of the departments. A radical change at that time was required because the Company had lost its leadership in the tobacco industry and, in fact, was subordinate to the position held by R. J. Reynolds Tobacco Company.

XLIV. As a result of the services rendered by the defendants under the leadership of defendant Hill, the following results were achieved:

(a) Gain in Sales of Cigarettes

Year	Percentage
1926	20.14%
1927	22.44%
1928	29.59%
1929	34.16%
1930	38.10%

(b) Net Earnings of the Company After Deducting all Charges and Expenses for Management, Taxes, etc.

Year	Amount
1924	$20,839,694
1925	22,288,596
1926	22,549,094
1927	23,309,689
1928	25,066,299
1929	30,231,348
1930	43,345,370

[fol. 89] (c) Dividends on Common Stock

Year	Amount
1924	$12,202,675
1925	16,109,922
1926	15,622,486
1927	15,622,856
1928	15,623,172
1929	21,091,536
1930	29,293,983

In the first quarter of 1931, besides the regular dividend of $1.25 per share, an extra dividend of $1.00 per share was declared. The total dividends paid so far for the year 1931 exceed $28,300,000.

XLV. Prior to 1926 the Company distributed its advertising expenditures among all its products. They included the following brands amongst others:

Smoking Tobacco Brands

Lucky Strike	Bull Durham
Tuxedo	Five Brothers
Peerless	Old English

Plug Tobacco Brands

American Navy	Ivy
Square Deal	Corker
Spear Head	Town Talk
Piper Heidsieck	Newsboy
Standard Navy	

[fol. 90] Cigarette Brands

Sweet Caporal
Pall Mall
Hassan
Mecca

Little Cigar Brand

Sweet Caporal

Fine Cut Brand

Virgin Leaf

Beginning in 1916 the trade name or brand "Lucky Strike" which up to that time had been used only for tobacco was for the first time used for the cigarette which is now the well-known Lucky Strike cigarette.

XLVI. Upon defendant Hill's election to the Presidency, and under his guidance, the Board of Directors of the Company instituted a complete re-organization of the many departments of the Company. This has resulted in the Company functioning in the following manner:

(a) Defendant Hill, as Chief Executive of the Company, has general supervision of all its departments, including sales, advertising, foreign operations, manufacturing, exporting, auditing, purchasing of leaf tobacco, etc. That supervision involved and involves more than mere cursory passing upon the functioning of those different departments; it involved and involves an actual participation in the programs of those departments, and particularly [fol. 91] in those branches of the Company that are of paramount importance in its development.

One of the chief functions and responsibilities resting upon defendant Hill is that connected with advertising, which entailed an expenditure in 1930 of $20,470,758.43. That amount was part of the expenditure that had to be recouped, and was recouped, by the Company before the net profit in excess of $43,000,000 was made for the year 1930.

The advertising is divided into six different departments, or branches, to wit:

Newspaper copy,
Magazine advertisements,
Displays,
Lucky Strike radio hour,
Publicity, and the
Cremo radio program.

The formula or plan for newspaper advertising, which is the basis of the advertising program, is originated by a committee of which the defendants Hill and Riggio are members. This committee has originated some of the slogans which have helped create the demand for Lucky Strike cigarettes and which are worth today incalculable amounts.

One of the most important branches of the tobacco industry is the purchasing of tobacco. Defendant Hill has a thorough knowledge of all the varieties of tobacco. At an early stage of his career he had his experience in the tobacco fields where he acquired first hand knowledge of the [fol. 92] manner in which tobacco was grown, and the ability to select the proper kinds. In connection with the purchasing of tobacco, the requirements of the Company are such that plans must be made far ahead to take care of its needs. In order to accomplish this properly, defendant Hill has instituted a Committee on Leaf Tobacco. This Committee plans the buying schedule to take care of its entire needs. That Committee was composed during the lifetime of Mr. Penn, of the defendants Hill and Neiley and the late defendant Penn. This Committee coordinates with and cooperates with the Sales Department. The tremendous increase each year of the needs of the Company must be anticipated. This involves more than an anticipation of the next year's production because it takes at least 2 years or more to place tobacco in such condition that it can be used in the different products manufactured by the Company. This leaf buying under the leadership of defendant Hill is of tremendous importance and value to the Company.

Lucky Strike cigarette is the finest blended cigarette sold in the market. In order to maintain that high degree of excellence, it is necessary to keep in daily contact with the variations in the tobacco crops. At one time, tobacco from a certain territory may be of the character that will fit into the blend and the next season tobacco from that

territory may sustain a change including either an increase or decrease in some of its constituents or a change in quality making it unsuitable for use in the blend. The Leaf Com-
[fol. 93] mittee under the direction of the defendant Hill performs the important function of maintaining the high quality of the blend which is so essential to the success of the Company.

Defendant Hill is in frequent communication with London to receive the reports of the English branch of the Company's business, in order to be fully apprised of all of its important matters enabling him to make suggestions and give necessary orders with respect to its operations. The English operations have become so large in volume and in such a condition that defendant Riggio has been selected to supervise them since the resignation of defendant Mower but during the growth of the English business which increased from 365,000 cigarettes per day in 1928 to over 12,000,000 cigarettes per day at the time that Mower resigned, defendant Hill by means of weekly telephone instructions to defendant Mower gave definite plans and advice which resulted in the attainment of that tremendous growth, which happened in England during the period when that country was in the throes of a severe depression, and in fact was suffering a loss of financial prosperity which resulted in an increased application of the dole and the departure from the gold standard.

The defendant Hill's working hours have not been the working hours of the average employee of the Company, that is, from nine to five; in addition, he devotes night after night to the origination of advertising slogans, to the development of sales programs, to the development of manu-
[fol. 94] facturing devices, to communication with other executives of the Company, either by telephone or by personal conference, for the benefit of the Company. He has instituted economies that have saved the Company in the past and are saving it at the present time, millions of dollars a year. The services that have been rendered by defendant Hill have been extraordinary and unique to such an extent that there could be no other one man found in this country who could perform all the functions which he performs. At no time has the compensation received by defendant Hill been greater than the fair and reasonable value of the services rendered by him for the period for

which such compensation was paid, and the compensation now being received by said defendant, including the compensation under Article XII of the By-Laws, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(b) Upon the disintegration of the Company, it retained the following factories:

Durham, N. C. (Blackwell's Durham Tobacco Co.),
New York (Butler-Butler, Inc.),
Milwaukee, Wis. (F. F. Adams Tobacco Co.),
Danville, Va., Danville Branch—little cigars;
Baltimore, Ellis A—little cigars;
New York, Duke Branch;
Baltimore, Felgner Branch;
Louisville, Finser Branch;
[fol. 95] New York, Kinney Branch;
Baltimore, Marburg Branch;
Richmond, Mayo Branch;
Nashville (Nashville Tobacco Works),
Richmond (R. A. Patterson Tobacco Co.),
Brooklyn, Penn Street Branch—cigarettes;
Reidsville, N. C. (F. R. Penn Tobacco Co.),
Middletown, Ohio, Sorg Branch;
Louisville, National Branch,

where the manufacturing of tobacco took place.

The manufacturing of tobacco was in charge of the late defendant Penn, with whom the defendant Neiley coordinated. They instituted a policy of concentration in manufacturing, which resulted in the elimination of all factories but those situated at Durham, Louisville, Reidsville, Richmond and Nashville.

The Richmond factory is the last one built. The building of that factory was planned and supervised by those defendants, and is considered the best of its kind in the tobacco industry.

They have also concentrated the leaf handling and stemming operations. As a result of their services, a uniformity of production and economy of manufacture have been effectuated, so that the cost of producing cigarettes has been constantly reduced. One of the great outstanding features of the Lucky Strike cigarette is the "Toasting Process". That was originated by the late defendant

[fol. 96] Penn. The "Toasting Process" results in the elimination of greater quantities of nicotine, acetic acid, ammonia, ethyl acetate, formic acid, furfural, isovaleric acid, and waxy substance as compared with the quantities removed by earlier methods. Those chemical constituents in a large measure make up the "bite" in tobacco. The "Toasting Process" in the main consists of subjecting the tobacco to heat without destroying the quality of the tobacco. By the use of the "Toasting Process" a sweeter and mellow tobacco with less harsh irritants is produced. In order to apply that high temperature without injuring the quality of the tobacco, special machines were invented under the guidance of the late defendant Penn. No other tobacco company has been successful in applying heat to tobacco in that manner. Machines have been developed under the guidance of the late defendant Penn to distribute the proper amount of tobacco on the cigarette paper so that the cigarette should have the proper weight in accordance with a predetermined formula; machines have been developed that automatically count the cigarettes in lots of twenty, wrap them with paper-backed foil, over which is applied the outside label, and affix United States revenue stamps on the individual packages, sealing the same; machines have been developed which wrap and seal the package with cellophane.

At the Richmond factory very many different brands of smoking tobacco are manufactured and tobaccos from various parts of the world are in use there. More than 4,800 different kinds and sizes of wrapping material are used. [fol. 97] The supervision and management of that branch require a thorough knowledge of and familiarity with all tobaccos, blends and flavors.

In 1929 the late defendant Penn was made Vice-President of the American Cigar Company, in charge of its entire production, at which time its production was small. The cigars were manufactured by hand in various factories scattered throughout the country. In a period of less than ten months the manufacture of cigars was entirely revolutionized into the making of cigars by machines and the concentration of large factory units. Following the policy of concentrating that had been adopted with cigarettes, the Company decided to concentrate upon one cigar and the brand taken for development was the Cremo cigar. When

the late defendant Penn took charge of the production, the output was approximately 90,000 cigars a day. Under his guidance and at the time of his death the approximate daily output was 2,000,000 cigars.

The services that the late defendant Penn and defendant Neiley rendered were extraordinarily valuable to the Company, reduced the cost of manufacturing, enabling thereby the stockholders to have a larger return. The services rendered by the late defendant Penn were far more valuable to the Company during the period for which they were rendered than any compensation paid to him, including any compensation which may have been received by him or may be received by his representatives under Article XII of the [fol. 98] By-Laws. At no time has the compensation received by the defendant Neiley been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including any compensation under Article XII of the By-Laws, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(c) The defendant Mower, who resigned from the Company on July 31, 1931, was in charge of the English branch of the Company's business. The English branch has been and is engaged in the manufacturing of a brand of cigarette called Kensitas, which is a different type and kind of cigarette than the Lucky Strike, due to the fact that the English taste is not for a blended cigarette but a Virginia cigarette. Defendant Hill and Mower have been associated for many years with the result that they were thoroughly imbued with one another's methods and ideas. Defendant Mower was selected by defendant Hill as the man to exploit the Company's business in England and it was because of said defendant Mower that defendant Hill approved the extension of the business to England—an extension which, already successful, offers vast possibilities to the Company and to the stockholders of the future and is today one of the Company's valuable assets. Defendant Mower had been in charge of the English branch since 1928, at which [fol. 99] time the volume of its business was comparatively small. Under that defendant's management, it has de-

veloped to the point where it now has the second largest volume of sales of shilling cigarettes in Great Britain. That defendant increased the sales of cigarettes by a vigorous advertising campaign, improved concentration of methods of manufacturing and production, improvements in the selling organization and bringing to England American methods of doing business. Prior to the assumption of the leadership of the English branch, defendant Mower had been the Vice-President of the Company coordinating in advertising and sales. The devotion of that defendant to the Company had been such that, despite the advice of his physicians and at great peril to his health, he continued with the Company until his physical condition became such that he was compelled by his medical advisers to retire from all business activities. The services rendered by defendant Mower were far more valuable to the Company than any compensation paid to him, during the period for which they were rendered, including any compensation which may be received by him under Article XII of the By-Laws.

(d) Defendant Riggio was and is the Vice-President in charge of sales and advertising, responsible for the organization and function of the sales department. The sales department is divided into five sections, each section being responsible for a certain territory in the United States. Each section is in charge of a section manager, who in turn has field managers, division managers and retail salesmen. [fol. 100] The responsibility for the function and activities of all the men in those departments is a part of the duties imposed upon defendant Riggio. Among other departments for which the defendant is responsible are the following: the advertising department dealing with displays and posters, the navy department, Turkish cigarette department, the high grade tobacco department, private brands, the export department, and the Lucky Strike radio hour.

In planning the Lucky Strike radio hour, defendant Riggio coordinates with defendant Hill. The Lucky Strike radio hour is of great importance to the Company. It is a form of advertising that reaches millions of people from coast to coast. The Lucky Strike radio hour is on the air on Tuesdays, Thursdays and Saturdays of each week by means of a national broadcasting system. The purpose of

the Lucky Strike radio hour is to accelerate the sales of the Lucky Strike cigarettes, which is the brand of cigarette upon which the Company concentrates in this advertising. The success of the selling program is dependent to a great extent upon the success with which the Lucky Strike hour is received by the radio public. The planning of this hour involves a great deal of care and attention, as the hour is comprised of a musical performance combined with an advertising program. One must lead into the other so as to hold the greatest interest for the public and at the same time increase the public's desire to purchase the Lucky Strike cigarette. If this hour is not well planned, it would [fol. 101] mean a loss of money to the Company by reason of the expense that it entails. Furthermore, the radio hour must fit into and supplement the other advertising media used by the Company.

Defendant Riggio was and is in charge of the sales and advertising of American Cigar Company, a subsidiary of the Company, which Cigar Company has increased its sales from 90,000 cigars a day in 1929 to more than 2,000,000 a day at the present time. Defendant Riggio is responsible for the organization of the sales department and has instituted economies that have resulted in savings of large sums of money for the Company each year.

Illustrating the value of the services rendered by that defendant is the increase in the proportion of Lucky Strike cigarettes sold, with the slight increase in the cost of sales, to-wit:

	Increase in quantity of sales	Percentage of cigarettes sold	Cost of sales
1929	36,992,668,284	34.16	$4,242,814.46
1930	43,212,434,694	38.10	4,901,119.16

Defendant Riggio is one of the outstanding men in the tobacco industry to-day. He is one of the great sales executives of the United States. His services have been of a unique and peculiar value that cannot readily be placed. He has a thorough knowledge of the tobacco industry and the psychology of the buying public. He has the unique ability or organizing sales campaigns that have been with- [fol. 102] out parallel in the history of the tobacco indus-

try. He has maintained a morale in the sales organization of the Company that results in his subordinates functioning at the highest degree of efficiency. At no time has the compensation received by the defendant Riggio been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including any compensation that he may receive under Article XII of the By-Laws, is not greater than the fair and reasonable compensation for the services now being rendered by him.

XLVII. The job of manufacturing and vending over one hundred and fifty million articles daily is an almost superhuman task. In itself it constitutes a gigantic service by this Company to the public. First the acquisition and selection of the raw materials of the highest quality and yet adaptable to economic needs of the industry, the handling and preparation of those materials so as to be ready for each day's supply, the maintenance of uniform standards of grade, quality and taste so as to satisfy a highly discriminating public, form the primary basis of the business. Unless this is maintained at the highest possible standard and uniformly maintained, no ingenuity can induce the consumer to give his patronage.

Then the exact details of the blended mixture, the hygienic treatment, and the interminable organization of [fol. 103] human effort involved in the physical process of manufacturing, gathering, wrapping, packing and delivering daily over one hundred and fifty million articles is a problem which would have been impossible at any time during the history of civilization up to the last twenty years. It requires eternal vigilance for the latest development in the art, the utilization of every cost-saving device, and ceaseless ingenuity in search of constant improvement. When it is realized that from this vast daily turnover the corporation makes but a fraction of a cent per article and the Government by its excise tax alone charges one-third of a cent, some idea of the tremendous consequence of every hundredth of a cent in cost per article may be gleaned.

But quite aside from this tremendous manufacturing achievement there is a still greater problem involved in

the sales. In no industry in the world is competition keener or more ruthless than in the cigarette business. The competitors are powerful, ingenious and alert to every possible advantage, spending millions of dollars in publicity both in defensive and offensive tactics, and no manufacturer can hope even to hold his own with them unless he can develop a product in fact superior to theirs as to quality and as to certain innate characteristics unsusceptible of imitation. After all, a cigarette is but a small roll of tobacco cased in paper. The gamut of attributes of such an article is essentially limited. But first the quality bears infinite study and is capable of great skill in selection; then the nature of the blend permits the greatest ingenuity; [fol. 104] and thereafter the process involves secret treatment so as to eliminate harmful constituents and to improve the desirable ones. Therein lies opportunity for continuous scientific laboratory tests and analyses, all to the end that the ultimate smoking of the cigarette shall produce the greatest delectable sensation with the least deleterious effect upon the smoker. Then of course the style and fashion of the package are most important. It must appeal to the eye; it must be easy of handling; it must preserve exactly the proper condition of the article contained; and yet it must economically fall within the narrow margin of cost of which so cheap an article permits.

Having carefully and unremittingly attended to all these problems and having built up a vast organization thoroughly attuned to the daily needs, it still becomes essential for the management constantly to find new and interesting themes by which to keep the product always in the public mind without arousing the antagonism of offensive repetition; and this need is never completely discharged. The greater the growth of the business the more accentuated becomes the need.

XLVIII. As remarkable as the growth of the business, is the increase, in the number of Lucky Strike cigarettes sold in 1930 as compared with the increase of cigarettes sold in the United States. In that year, the total increase in cigarettes, according to the Revenue figures of the Federal Government, was approximately five hundred million, [fol. 105] whereas the increase in Lucky Strike cigarettes was nearly six thousand million; in other words, the Com-

pany took approximately five thousand five hundred million cigarettes from its competitors. For the first ten months of 1931 the Company has continued to gain in the sale of its Lucky Strike cigarettes at the expense of its competitors in practically the same ratio as it had for the year 1930, in that the sale of other cigarettes has decreased by four thousand four hundred seventy-nine million cigarettes, whereas the Lucky Strike sales have increased by two thousand three hundred ninety-five million cigarettes.

When it is realized that in a year of depression such as 1930 this management showed a net profit of over forty-three million dollars and paid the United States Government over one hundred and fifty millions, some idea can be gained as to the efficiency with which this task has been done. Of course, such a work requires an army of people. It demands the highest skill in each department and the number of departments is numerous. But above all this army of highly efficient workers there is one chief executive—who must be alive to every section of every department of the business. The chief executive must surround himself with adjutant executives so as to carry out his policies and keep him alive to every development. Such has been the function of George W. Hill and such are the functions of the Board of Directors. Moreover, the quality of this work is best attested by the fact that in these days of depression this great Company is almost unique among [fol. 106] the industries of the world in showing a substantial advance in profits over the best year it has ever had in its history.

XLIX. The various forms of compensation (in addition to a fixed salary) paid to the executors and key men of the Company by means of a participation in the profits or by an allotment of shares of its stock are based upon a principle of administration of the Company conceived by one of the greatest industrial leaders of all times, the late James B. Duke, and recognized by his successors in office. That principle is, in order to obtain the greatest effort, services, loyalty, efficiency and results a compensation other than a fixed compensation must be held out to the men who are in positions of responsibility; that compensation must be of such a nature as to make those men feel and realize that they are part owners of the business and

that their personal success and prosperity are measured by the success and prosperity they achieve for the Company and its stockholders. The fruition of that principle is established and justified in its application, in the continuous increasing success of the Company, and its maintenance is essential to its future prosperous life.

L. That Article XII of the By-Laws was duly authorized by the stockholders of the Company at a duly constituted meeting after due notice given to all of the then stockholders of the Company and said plan was duly authorized and is legal and valid under the laws of the State of New Jersey.

[fol. 107] Under the laws of the State of New Jersey the directors had authority to appoint such officers and agents as the business of the Company might require and to allow them suitable compensation, and by the Charter and By-Laws of the Company *and* the administration of the affairs of the Company was vested in the directors and by authority thereof said directors had power to fix the compensation of all officers and employees of the Company; that pursuant to said laws, the Charter and By-Laws the directors had authority to pay such compensation as was received by the defendants and that the compensation so paid did not in the aggregate constitute more than fair and reasonable compensation for the services rendered by those defendants respectively.

Upon information and belief, the stock which is now represented by the Common Stock of which plaintiff is the record holder voted at the meeting of March 13, 1912, for the resolution authorizing the adoption of Article XII of the By-Laws.

LI. Plaintiff at the annual stockholders meeting, in attempting to prevent the defendant Hill from being reelected as a director of the Company, was imperiling and prejudicing the investment of some 40,000 stockholders, by nominating, in place and instead of defendant Hill—who is the one who has been so largely responsible for the continuous success of the Company and has surrounded himself with associates who are of extraordinary capacity and ability and who himself knows every branch of the tobacco industry from the purchasing of the leaf to the ultimate [fol. 108] disposition of the finished product—a man who

had no experience whatsoever in the tobacco business, a man who knew nothing about the leaf buying, who knew nothing about the blending of cigarettes, who knew nothing about advertising, who had been associated for twenty years with a company whose business is wholly foreign to the tobacco business and of whom plaintiff stated at the meeting that he did not know him, of him or about his qualifications.

Wherefore defendants demand judgment that the amended complaint be dismissed with costs.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company. Office & P. O. address: No. 25 Broadway, Borough of Manhattan, New York City. Victor J. Dowling, Louis S. Levy, William M. Parke, George W. Whiteside, J. Arthur Leve, Counsel.

[fol. 109] *Duly sworn to by Charles F. Neiley. Jurat omitted in printing.*

[fol. 110] EXHIBIT A TO ANSWER

Article XII of the By-Laws

The compensation so taken into account in making allotments under the Plan, included money compensation of every kind, whether fixed salary or contingent compensation. It therefore included, as to the President and the five Vice-Presidents, compensation under Article XII of the by-laws adopted by vote of the Stockholders of the Company in 1912.

That by-law is believed to have been originally suggested by the late Mr. James B. Duke, and we understand that by-laws similar in principle and percentage, although differing in form and method of application, were, at his instance, adopted by most of the other companies that emerged from the old American Tobacco Company as a result of the court decree in 1911.

That by-law provided in effect that in any year beginning with the year 1912 in which the net profits earned by The American Tobacco Company in the tobacco business

exceeded $11,369,000 (to wit, $8,222,245.82, the amount of net profits earned in 1910 by the businesses retained by The American Tobacco Company under the Federal decree in the anti-trust case, plus approximately $3,147,000, annual dividends on the 6% Preferred Stock of the Company) the Treasurer of the Company was to pay an amount equal in the aggregate to 10% of such excess of net profits to the President and the five Vice-Presidents of the Company. One-quarter, or 2½%, of such amount was to go to the President and the remaining 7½% to be divided among the [fol. 111] five Vice-Presidents. Such payments were to be as salary for any such year, in addition to the fixed salaries of each of said officers.

It was provided that the net profits for the purposes of such by-laws should consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as should be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6% dividends on $52,459,400 of its 6% preferred stock, to which profits should be deducted, as the case might be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year, of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Copmany, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited. It is to be noted that although the Company ordinarily has income from sources, other than those included in this by-law—such, for instance, as that from the American Cigar Company and certain other Subsidiaries—the income from such other sources is excluded and this compensation is restricted and based only upon the profits from sources included in the language of the by-law. It will also be noted that this compensation, based upon the net profits of the Company, was adopted by the Stockholders in 1912 and is in no wise dependent on any vote of the Directors or action of officers. It is, as it states itself to be, a "salary for the year, in addition to the fixed salary [fol. 112] of each of said officers." The statement of net profits shown on the Company's annual reports to stock-

holders represents the amount of net profits remaining after the deduction of such compensation, as well as all expenses of management of whatsoever character, including depreciation and obsolescence and also after deducting taxes, of which over One hundred and fifty million dollars ($150,000,000) were paid to the United States Government alone for the year 1930.

The sound common sense underlying Mr. Duke's plan of contingent compensation to executives is amply demonstrated by the great advances made by the several companies to which it was applicable, but in no case has it been more completely justified than in that of The American Tobacco Company as exemplified by its progress and brilliant success.

[fol. 113] IN UNITED STATES DISTRICT COURT

E-59-115

[Title omitted]

ORDER FOR FURTHER PARTICULARS—Nov. 6, 1931

A motion having been made by defendants George W. Hill, C. F. Neiley, V. Riggio, The American Tobacco Company, and Charles A. Penn (now deceased) for an order requiring the plaintiff to amend his bill of complaint by setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's complaint, in accordance with the notice of said motion;

And after hearing William M. Parke, Esq., of counsel for defendants George W. Hill, C. F. Neiley, V. Riggio, The American Tobacco Company, and Charles A. Penn (now [fol. 114] deceased), in support of the motion, and Richard Reid Rogers, sua persona, for plaintiff, in opposition thereto;

Now, on motion of Chadbourne, Stanchfield & Levy, attorneys for defendants George W. Hill, C. F. Neiley, V. Riggio, and The American Tobacco Company,

It is ordered, that defendants' motion to compel plaintiff to amend his bill of complaint by setting out a further and

better statement of the nature of plaintiff's claim be and the same hereby is granted as follows:

1. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 8 of the bill of complaint, by setting forth

(a) the Employees' Stock Subscription Plan;

(b) the resolution under which said Plan was adopted by stockholders on July 28, 1930.

2. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 12 of the bill of complaint, by setting forth

(a) the by-law adopted at a stockholders' meeting of the defendant company on February 21, 1912;

(b) notice of said meeting sent to stockholders;

(c) the names of the proxies who were themselves financially interested and who expected to and did thereafter [fol. 115] receive the profits paid out by the defendant company pursuant to said by-law.

3. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 13 of the bill of complaint, by setting forth

(a) a copy of the written demand made on the defendant The American Tobacco Company to institute action against the individual defendants;

(b) a copy of the letter addressed to the plaintiff by the company in which it declined to bring such suit.

4. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 14 of the bill of complaint, by setting out a copy of the pamphlet distributed to stockholders by defendant George W. Hill on or about March 14, 1931.

Woolsey, United States District Judge.

Plaintiff consents to the form of the order but excepts to the order itself.

Rich'd Reid Rogers.

[fol. 116] IN UNITED STATES DISTRICT COURT

E-59-115

[Title omitted]

STIPULATION AS TO FURTHER PARTICULARS, ETC.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, as follows:

1. The information directed to be furnished in this action has been furnished in an amended complaint served subsequent to the making of the motion for further particulars (which service of said amended complaint was made without prejudice to the existence of such motion), except the following:

(a) Further and better particulars as to the matters stated in paragraph 8 of the bill of complaint by setting forth

(i) the Employees' Stock Subscription Plan;

(ii) the resolution under which said Plan was adopted by stockholders on July 28, 1930.

[fol. 117] (b) Further and better particulars as to the matters stated in paragraph 14 of the bill of complaint by setting out a copy of the pamphlet distributed to stockholders by defendant George W. Hill on or about March 14, 1931.

2. That such information shall be furnished in the form of a bill of particulars in lieu of the service of an amended complaint setting forth such information, but such bill of particulars shall be deemed for the purposes of any motion that may be made by any party to this action as if incorporated and set forth at length in the amended complaint.

3. Such information shall be furnished in the form of a verified bill of particulars within ten (10) days after service of a copy of an order granting the undersigned defendants' motion for further particulars.

4. The undersigned defendants' time to answer, move, or otherwise plead with reference to the amended complaint

shall be extended to and including twenty (20) days after service of the verified bill of particulars.

Dated New York, November 6, 1931.

Rich'd Reid Rogers, Plaintiff, sua persona. Chadbourne, Stanchfield & Levy, Attorneys for Defendants Hill, Neiley, Riggio, and the American Tobacco Company.

So ordered.

Woolsey, United States District Judge.

November 6, 1931.

[fol. 118] IN UNITED STATES DISTRICT COURT

E-59-115

[Title omitted]

BILL OF PARTICULARS

Pursuant to order of Court entered herein November 7, 1931, plaintiff herewith furnishes further and better particulars of all matters covered by said order, except those as to which the further and better particulars have already been furnished by an amended complaint, as appears by stipulation of the parties hereto entered herein November 7, 1931.

1. With reference to the employees' stock subscription plan referred to in paragraph 8 of the original complaint and in paragraph 8 of the amended complaint, and covered by paragraph 1 (a) of the order, plaintiff refers to the plan adopted by resolution of the stockholders July 28, 1930, a copy of which is annexed hereto and marked "Exhibit A"; to the agreement between the defendant The American Tobacco Company and Guaranty Trust Company of New York and Junius Parker dated January 30, 1931, together with the subscription agreement therein referred to which was signed by the defendant, George W. Hill, in the amount of 13,440 shares, the defendant, Charles A. [fol. 119] Penn, in the amount of 8,025 shares, the defend-

ant, V. Riggio, in the amount of 4,000 shares, the defendant, C. F. Neiley, in the amount of 3,000 shares, and the defendant A. C. Mower, in the amount of 1,000 shares, of common stock B, a copy of which agreement, with the subscription agreement therein referred to, appears on pages 16 to 28, inclusive, of the pamphlet issued by George W. Hill, annexed hereto and hereinafter referred to as "Exhibit C"; and to the further fact that in carrying out said plan the Guaranty Trust Company of New York on February 10, 1931, paid the defendant, The American Tobacco Company, $1,417,800 for 56,712 shares of said common stock B, out of which the allotment to the individual defendants referred to above was made.

2. With reference to the resolutions under which said employees' common stock subscription plan was adopted by the stockholders on July 28, 1930, referred to in paragraph 8 of the original complaint and in paragraph 8 of the amended complaint, and covered by paragraph 1 (b) of the order, plaintiff annexes hereto a copy of said resolutions and makes the same a part hereof, marked "Exhibit B."

3. With reference to the pamphlet distributed to stockholders by the defendant, George W. Hill, on or about March 14, 1931, referred to in paragraph 14 of the original complaint and covered by paragraph 4 of the order, plaintiff annexes hereto a copy of said pamphlet and makes the same a part hereof, marked "Exhibit C."

Dated New York, N. Y., November 10, 1931.

Richard Reid Rogers, Plaintiff in sua Persona. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

[fol. 120] *Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.*

[fol. 121] EXHIBIT A TO BILL OF PARTICULARS

Employees' Stock Subscription Plan

I. Purpose

The purpose of this Plan is to accord such employees of The American Tobacco Company (herein called the "Cor-

poration") and its subsidiaries, and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of the stock of the Corporation.

II. The Plan

The Plan is to allot for subscription, in the manner and upon the conditions herein provided, by way of additional compensation for services to be rendered, shares of the unissued Common Stock B of the Corporation which may be authorized by amendment to the Certificate of Incorporation of the Corporation voted at the same meeting of stockholders at which this Plan may be approved, to such of the employees of the Corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected as hereinafter set forth; provided, however, that there shall at no time be any issuance of shares under this Plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

[fol. 122] III. Execution of the Plan

The Board of Directors may, at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries, and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose.

IV. Rights of Subscriber Prior to Payment

No stock shall be delivered until such stock has been fully paid for. The Board of Directors, however, may provide that subsequent to subscription for said stock and prior to the time the full subscription price has been paid,

the subscribers shall possess such voting (if any) and other rights pertaining thereto, including the right to receive dividends thereon and to subscribe to any new issue of stock of the Corporation, that may be permitted to other holders of Common Stock B of the Corporation. Any and all payments accruing to any such subscriber, by way of dividends or otherwise, prior to the full payment for his stock shall be credited to the subscriber on account of the payments agreed to be made by him in the purchase of said stock, and shall not be paid directly to such subscriber until full payment for his stock has been made.

[fol. 123] V. General Conditions

The Board of Directors may attach to each offering of stock such detailed conditions governing the cancellation and withdrawal of subscriptions and refund of payments and the handling of the same in case of death, disability or pensioning of employees, temporary suspension of employment, permanent discharge or leaving service, or providing for other special situations, in such manner as it shall deem reasonable and appropriate and best calculated to effectuate the purposes of this Plan; provided that in no event shall any amounts paid in be forfeited; and in case of cancellation or withdrawal, all such amounts shall be returned with interest at such rate, not to exceed Six Per Cent (6%) per annum, as the Board of Directors may determine. No employee or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

VI. Recall or Amendment

This Plan may be recalled, abolished, revised, amended, altered or changed, as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for the year 1920.

[fol. 124] EXHIBIT B TO BILL OF PARTICULARS

Resolution Adopted at Special Meeting of the Stockholders of the American Tobacco Company on July 28, 1930

(Relating to Employees' Stock Subscription Plan)

Whereas, the officers of the Company have formulated a plan to accord to such employees of The American Tobacco Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as therein provided, by way of additional compensation for services to be rendered, an opportunity to purchase the capital stock of the Corporation and to participate in the other benefits of the plan; and

Whereas, said plan has been considered by the Board of Directors and by resolution duly passed at its meeting held on June 25, 1930, the Board of Directors declared that in its opinion the adoption of said plan is advisable; and

Whereas, the plan so formulated and approved and sent to the stockholders with the notice of this meeting has been presented at this meeting, and we are of the opinion that it will be in the best interests of the Company to adopt the same;

Now, therefore, be it resolved that the said plan be and the same hereby is approved and adopted.

Further resolved that the President, the Board of Directors and other proper officers of the Company be and [fol. 125] they hereby are authorized, directed and empowered, to take all such steps and do any and all such acts and things that may be authorized by the terms of said plan as well as any and all such other acts and things as may be necessary and proper to execute, carry out and accomplish the full purpose and intent of said plan and of this resolution.

EXHIBIT C TO BILL OF PARTICULARS

The American Tobacco Company

Employees' Stock Subscription Plan, 1931

For the information of the Stockholders of The American Tobacco Company, there is submitted this statement

relative to the Employees' Stock Subscription Plan as authorized at the special meeting of Stockholders of the Company held on July 28, 1930.

The American Tobacco Company

Accompanying the notice of the special Stockholders' meeting of July 28, 1930, sent to all stockholders, was a copy of a proposed Employees' Stock Subscription Plan to be submitted to the meeting, also a letter from George W. Hill, President of the Company, containing the following:

[fol. 126] "Your Board of Directors takes pleasure in reporting that, notwithstanding the high record of last year as reflected in the Treasurer's report submitted to you at the last Annual Meeting, your Company's business during the first five months of the current year has surpassed all previous records for corresponding periods. The net profits for the first five months of the current year has surpassed all previous records for corresponding periods. The net profits for the first five months of this year, as shown by the books of the Company, after allowing for bond interest and preferred dividends, show an increase of more than 100% over the figures for the corresponding period of last year, and the outlook for the remainder of the year 1930 is very encouraging. This situation enables us to take those steps in the interest of our Stockholders which we predicted in 1929."

There followed a reference to the proposed split-up of shares of Common Stock, including Common Stock B, and the necessary accompanying change in the voting power of the preferred stock. The letter then continued:

"There will also be submitted to the Stockholders at this special meeting a plan for the issuance and sale of shares of Common Stock B of the Company to employees and persons actively engaged in the conduct of the Company's business. A copy of the plan is enclosed. I am certain that every Stockholder will agree that it is to the Company's [fol. 127] interest that the organization which has made possible the great success which the Company has enjoyed during the past few years should be given every encouragement to continue in the Company's employ. It is the purpose of this plan, conforming with the policies of many

large business enterprises, to offer inducements by way of stock ownership in the Company to the men who have made that success possible, so that the Company and its Stockholders will have the assurance of their continued services in carrying the business forward with maximum enthusiasm and efficiency."

The Plan

The Plan, which, as above stated, was printed in full and attached to the notice of the special stockholders' meeting of July 28, 1930, mailed to all stockholders, stated that its purpose was

"to accord to such employees of The American Tobacco Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of stock of the Corporation."

The Plan provided that the stock to be allotted for subscription was to be unissued Common Stock B which might be authorized at the same meeting of stockholders at which the Plan might be approved, but it was provided that there should at no time be any issuance of shares under the Plan [fol. 128] when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

The Plan further provided that the Board of Directors might at such time or times as it might determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription to employees of the Corporation and/or its subsidiaries and to those actively engaged in the conduct of its or their business in such amounts and proportions, to such persons, at such prices, not less than the par value of the shares allotted, payable in full or in instalments, and upon such other terms and conditions, all as should be determined with respect to each offering of stock to each individual, pursuant to authority to be granted by the Board of Directors to the President for such purpose.

The Plan further provided that no stock was to be delivered until fully paid for, but dividends were to be credited to the subscriber on account of payments agreed to be made by him in the purchase of such stock.

The Plan further provided that no employee or person actively engaged in the conduct of the business of the Corporation or its subsidiaries was to be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

[fol. 129] Approval Granted by Stockholders

The response of the Stockholders to the various proposals contained in the notice and in the President's letter was one of overwhelming approval. The attendance of Stockholders at the meeting in person and by proxy was approximately eighty per cent of the total outstanding stock, this being the largest amount of stock ever represented at a Stockholders' meeting of the Company. Both on the vote for the proposed changes in the capital structure and on the vote for the Employees' Stock Subscription Plan, the vote far exceeded the two-thirds required by the laws of New Jersey. The total of votes of Preferred, Common and Common B shares voting in favor of the Plan was 2,228,488 and a total of 2,112 shares voted against. In other words, approximately 99.991% of the stock present in person or by proxy voted in favor of the Employees' Stock Subscription Plan and approximately 80% of the total outstanding stock of the Company approved the Plan.

Results Achieved by Present Management and Operating Personnel

Your Board of Directors deemed it advisable to wait until the results of the Company's operations for the entire year 1930 were known before taking any action to put the Employees' Stock Subscription Plan into effect. By the latter part of January, 1931, it was apparent that the Company had both in volume of business and net profits far surpassed, in the year 1930, the results of any previous year of its history, including the period before the break-up [fol. 130] of the old American Tobacco Company as a result of the Government's suit.

For instance in 1911, during the first eleven months of which the Company was still the owner of all the brands

and stocks in other companies which it was subsequently compelled to dispose of under the final decree in the Sherman Law case, the earnings of the Company for its preferred and common stock was $30,633,314. After the dissolution under the Court decree and the resulting loss of most of the brands and subsidiary companies, the net earnings of your Company dropped, until in 1915 they amounted to only $11,234,581. In December, 1925, Mr. George W. Hill became President of the Company and proceeded to build up the present management. Prior to that date the Lucky Strike Cigarette, which now constitutes the principal business of your Company, had been originated by Mr. Hill, who designed the package, including the wording, the name, the color and the shape, and Mr. Charles A. Penn, now Vice-President, who worked out the blend.

The results achieved under the present management speak for themselves.

Sales of Cigarettes

Year	Proportion of total cigarette production (based on U. S. Internal Revenue figures)
1926	20.14%
1927	22.44%
1928	29.59%
1929	34.16%
1930	38.10%

[fol. 131] The Government figures for the year 1930 compared with 1929 show an increase in total cigarette production of Five hundred eighty-six million seventy thousand (586,070,000) cigarettes. The Lucky Strike Cigarettes alone by actual sales* for the year 1930 show an increase

*In view of public statements which have been brought to our attention, apparently designed to detract from the tremendous success of Lucky Strike Cigarettes, to the effect that the statements of Lucky Strike sales published by The American Tobacco Company include exports, we will take this opportunity of stating without qualification or reservation that public statements of Lucky Strike sales represent only domestic sales and are therefore directly comparative with the United States Revenue figures.

over 1929 of more than Six billion two hundred nineteen million (6,219,000,000) cigarettes, a greater increase by more than Five billion five hundred million (5,500,000,000) cigarettes than shown by all cigarettes combined.

The net earnings of the Company and dividends are also indicative of what has been accomplished for the stockholders by the management:

Net Earnings of the Company After Deducting All Expenses for Management, Taxes, Depreciation, etc.

Year	Amount
1924	$20,839,694
1925	22,288,596
1926	22,549,094
1927	23,309,689
1928	25,066,299
1929	30,231,348
1930	43,345,370

[fol. 132] Dividends on Common Stock and Common Stock B

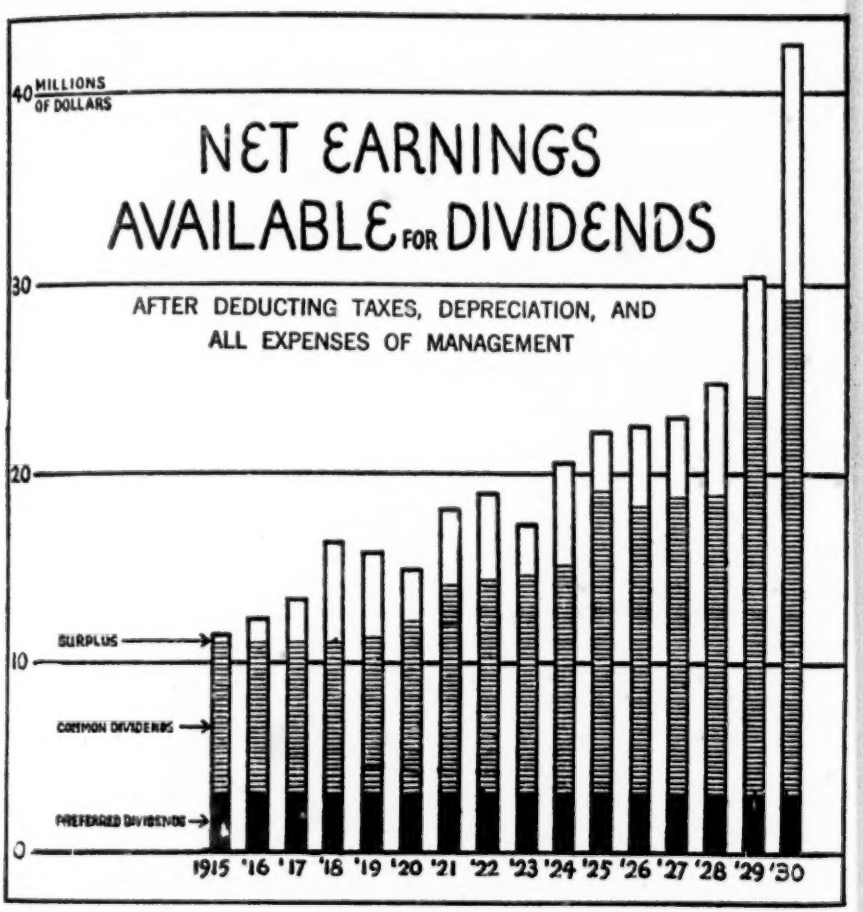
Year	Amount
1924	$12,202,675
1925	16,109,922
1926	15,622,486
1927	15,622,856
1928	15,623,172
1929	21,091,536
1930	29,293,983

In addition, the Company has paid dividends on the preferred stock each year of $3,161,982.

The following graphic chart shows, by years, the net earnings of the Company available for dividends from 1915 to 1930 inclusive, after deducting taxes, depreciation and all expenses of management, and the second chart (appearing on page 7) shows, by years, the amounts earned per share on Common and Common B Stock during the same period.

(Here follows chart, side folio 133)

Exhibit C.


40
MILLIONS
OF DOLLARS
NET EARNINGS
AVAILABLE FOR DIVIDENDS
AFTER DEDUCTING TAXES, DEPRECIATION, AND
ALL EXPENSES OF MANAGEMENT
30
20
10
0
SURPLUS
COMMON DIVIDENDS
PREFERRED DIVIDENDS
1915 '16 '17 '18 '19 '20 '21 '22 '23 '24 '25 '26 '27 '28 '29 '30

[fol. 134] Earnings for 1930—A Year of Acute Depression

It will be noted that the earnings of the Company for the year 1930 are $43,345,370, an increase of more than 43% over the year 1929, and that the dividends paid in 1930 upon the Common Stock and Common Stock B alone amounted to $29,293,983.

This was in the year of probably the worst depression that this country has ever experienced. Reported statistics show that 1,326 banks failed during the year 1930; that 782 corporations of public ownership reduced their cash dividends on common stocks and 470 corporations reduced their cash dividends on preferred stock, whereas your Company paid in that year upon its Common Stock and Common Stock B, dividends substantially exceeding the total earnings of the Company on its Common Stock in 1911, when it controlled a large part of the world's tobacco industry.

Comparison With Other Tobacco Companies

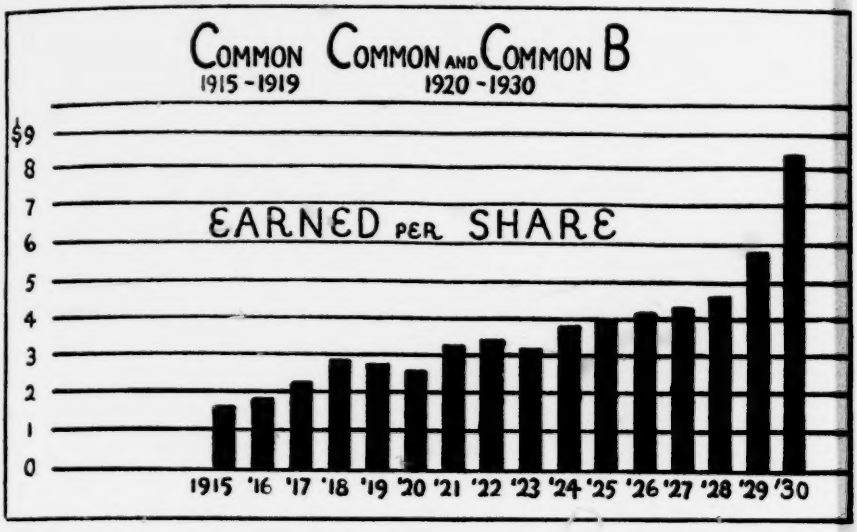
A comparison of the earnings of your Company with those of its principal competitors is also illuminating.

The total increase in earnings available for stockholders (after deducting bond interest, etc.) for the year 1930 compared with 1929, of the three principal competitors of your Company, was $6,309,039, whereas your Company's increase in such earnings for 1930 compared with 1929 was $13,116,165. In other words, your Company increased its earnings by more than twice as much as all three of its principal competitors combined.

The total earnings of those three competitors for the year 1930 (deducting bond interest, etc.) was $61,873,343, whereas such earnings of your Company for that year amounted to $43,294,769. In other words, for every dollar made for their stockholders in 1930 by the three competitors combined, your Company earned seventy cents.

(Here follows chart, side folio 135)

Exhibit C.


COMMON
1915 - 1919
COMMON AND COMMON B
1920 - 1930
$9
8
7
6
5
4
3
2
1
0
EARNED PER SHARE
1915 '16 '17 '18 '19 '20 '21 '22 '23 '24 '25 '26 '27 '28 '29 '30

[fol. 136] Stockholders' Action in Line With Modern Corporate Business Practice

It is obvious that such outstanding success as is pictured in the foregoing brief outline was not the result of accident or good fortune but was based upon able leadership and the teamwork of a well-knit, efficient organization.

It is strikingly apparent that nothing could be more vital to the interests of the Stockholders of this Company than the creation of a definite incentive to the management and organization which has accomplished the remarkable achievement above outlined and thus stimulate it to even greater efforts in the future. This is definitely in line with accepted modern corporate business practice. The action of the Stockholders at the meeting in July, 1930, was intelligently directed to that end in authorizing, as they did by a great majority, the Employees' Stock Subscription Plan. The object of that Plan was, by offering additional compensation for future services by way of stock ownership in the Company, to furnish the necessary stimulus and incentive to the employees and those engaged in the conduct of the Company's business who had achieved such remarkable results for the Stockholders in the past, and thus stimulate and encourage them to continue and even better those results. It was with recognition of these principles underlying such action of the Stockholders that the Directors in January, 1931, took up the task of putting into effect the Plan thus authorized by the stockholders.

[fol. 137] Formula Developed and Put Into Operation

Approximately 312,000 shares of Common Stock B were available for allotment under the Plan. It seemed advisable to allot only about one-sixth of these shares at this time, leaving the balance for future use. Accordingly, 56,712 shares were allotted to employees.

It was next necessary to select the employees who were to participate in the plan. After careful consideration it was the opinion of the Directors that the maximum beneficial results from the Plan would be obtained by extending it to a list of five hundred and thirty-five employees, beginning with the President and going down to and including sub-assistants in factory departments. As, with one excep-

tion, all of your Directors are executives engaged in carrying on the business of your Company, this list included all but one of the Directors. No Director voted upon his own allotment.

Inasmuch as the comparative value of employees to a business concern is almost invariably to be determined from the salaries or wages respectively paid to them, it seemed wise to adopt, as a general formula in allotting stock, a fixed ratio to the cash compensation which the Company was paying to each participant, adjusting the exact amount on the merits of each particular case. For this purpose the heads of all departments prepared lists of the employees who were to participate, rating all such employees in their respective departments on the basis of what was deemed to be their value to the Company, 100% representing the highest possible rating. The subscription price of [fol. 138] stock allotted under the Plan was fixed at $25 per share. To each employee rating 100%, shares were allotted having a par value of one-third of his annual rate of compensation during the year 1930. Employees rating less than 100% were allotted a smaller amount of stock.

Article XII of the By-Laws

The compensation so taken into account in making allotments under the Plan, included money compensation of every kind, whether fixed salary or contingent compensation. It therefore included, as to the President and the five Vice-Presidents, compensation under Article XII of the by-laws adopted by vote of the Stockholders of the Company in 1912.

That by-law is believed to have been originally suggested by the late Mr. James B. Duke, and we understand that by-laws similar in principle and percentage, although differing in form and method of application, were, at his instance, adopted by most of the other companies that emerged from the old American Tobacco Company as a result of the court decree in 1911.

That by-law provided in effect that in any year beginning with the year 1912 in which the net profits earned by The American Tobacco Company in the tobacco business exceeded $11,369,000 (to wit, $8,222,245.82, the amount of net profits earned in 1910 by the businesses retained by

The American Tobacco Company under the Federal decree in the anti-trust case, plus approximately $3,147,000, annual dividends on the 6% Preferred Stock of the Company) the Treasurer of the Company was to pay an amount [fol. 139] equal in the aggregate to 10% of such excess of net profits to the President and the five Vice-Presidents of the Company. One-quarter, or 2½%, of such amount was to go to the President and the remaining 7½% to be divided among the five Vice-Presidents. Such payments were to be as salary for any such year, in addition to the fixed salaries of said officers.

It was provided that the net profits for the purposes of such by-laws should consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as should be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6% dividends on $52,459,400 of its 6% preferred stock, to which profits should be added, or from which profits should be deducted, as the case might be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year, of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Company, Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited. It is to be noted that although the Company ordinarily has income from sources, other than those included in this by-law —such, for instance, as that from the American Cigar Company and certain other Subsidiaries—the income from such other sources is excluded and this compensation is restricted and based only upon the profits from sources included in the language of the by-law. It will also be noted [fol. 140] that this compensation, based upon the net profits of the Company, was adopted by the Stockholders in 1912 and is in no wise dependent on any vote of the Directors or action of officers. It is, as it states itself to be, a "salary for the year, in addition to the fixed salary of each of said officers." The statement of net profits shown on the Company's annual reports to stockholders represents the amount of net profits remaining after the deduc-

tion of such compensation, as well as all expenses of management of whatsoever character, including depreciation and obsolescence and also after deducting taxes, of which over One hundred and fifty million dollars ($150,000,000) were paid to the United States Government alone for the year 1930.

The sound common sense underlying Mr. Duke's plan of contingent compensation to executives is amply demonstrated by the great advances made by the several companies to which it was applicable, but in no case has it been more completely justified than in that of The American Tobacco Company as exemplified by its progress and brilliant success.

Arrangements with Employees Participating under the Plan

The arrangements for the sale of stock to employees under the Plan have been carefully safeguarded in order that they might be fair and just both to the Company and its employees. A copy of the form of agreement made with employees participating in the Plan forms a part of this statement. All dividends upon the stock are credited upon the purchase price. No stock is to be delivered to the employee until fully paid for. The 56,712 shares of stock [fol. 141] which have been allotted are by way of additional compensation for services to be rendered during the year 1931, and will not in any event be delivered until the end of the year. An employee whose connection with the Company is severed during the year 1931 for any reason, except his death, loses his right to the stock, although such loss may be waived in whole or in part by the Trustees on behalf of the Company, it being contemplated that special circumstances might exist in some cases for the mitigation of the severity of this rule. If any employee dies during the year, his allotment will be reduced based on the proportion of the year elapsing up to his death.

Each employee to whom stock was allotted under the Plan received the following letter from the President of the Company:

"January 30, 1931.

"I have the pleasure of saying to you, that, under authority granted by Stockholders on July 28, 1930, there

has been allotted to you by the Directors of this Company, — shares of American Tobacco Company 'B' Stock, to be sold to you at par—$25 per share and that in the course of a few days, you will receive from Mr. Thos. R. Taylor, Vice-President of the Company, the papers covering this sale and information regarding the details thereof.

"My purpose in writing you this letter, is to definitely say to you, that, in my opinion, the Stockholders have been generous in this recognition that they permit the Directors to make of your service and to point out to you that the [fol. 142] allocation has been made to you for the purpose of still further stimulating your efforts in the Company's behalf.

"Whether you are in charge of a factory or a Department, or whatsoever of our activities come under your direction, the allotment of stock has been made to you, based upon what the Officers of this Company deemed your efficiency to be. It is not given to you for services that have heretofore been rendered; it is not given to you in the nature of a bonus. The purpose of the allotment of stock, is solely to urge upon you further interest in the development of your Company's affairs.

"If you have been economical, industrious, resourceful and energetic in your attention to Company matters entrusted to your care (and to have been allocated the above amount of stock, you must have shown some of these virtues), I desire to emphasize to you that the Company will expect from you even greater application, even greater interest in the future than you have shown in the past.

"While I have no authority to make any commitment, it is my hope that sometime in the future, the Board will again be in a position whereby they may recognize the services that you will perform and the merit and value that you will deliver to your Company. I desire to assure you that if that time again comes, such recognition will be based upon the merits that you demonstrate.

"I do not want you to feel that this liberal action of your Company has placed you in the position whereby your services become, in your opinion, indispensable. I want [fol. 143] you to realize that you must go forward in your striving and that, indeed, although now your efforts have been well recognized, recognition in the future will depend upon services rendered in the future and that if such recog-

nition does not come to you, should it come to others, it might well be that the position that you fill could be more ably filled by another.

"I congratulate you upon the recognition accorded you by the Board of Directors and in all friendship I send you this letter of encouragement, of frankness and good-will.

Cordially yours, George W. Hill, President."

Although the Company has always had an exceedingly hardworking and loyal organization, it has been demonstrated, even in the few weeks that have elapsed since the allotment of stock to employees under the Plan, that the tangible indication of the Company's appreciation of their work, evidenced thereby, had made itself felt and is evidenced in the increased enthusiasm of employees on their jobs, this being true in every branch of the organization.

There follows herewith a detailed statement of the shares of stock allotted to each individual employee to whom stock has been allocated. The names of the individuals are omitted for organization reasons.

President	13,440
Vice-Presidents	16,685

[fol. 144]

1	980	20	200
2	665	21	200
3	560	22	200
4	400	23	200
5	330	24	200
6	260	25	187
7	260	26	165
8	260	27	160
9	260	28	160
10	260	29	160
11	250	30	160
12	250	31	160
13	250	32	150
14	240	33	150
15	240	34	135
16	220	35	130
17	220	36	130
18	210	37	130
19	200	38	130

39	125	81	60
40	125	82	60
41	125	83	60
42	125	84	60
43	120	85	60
44	110	86	60
45	110	87	60
46	100	88	60
47	100	89	60
48	100	90	60
49	100	91	60
50	100	92	60
51	100	93	55
52	100	94	55
53	100	95	50
54	100	96	50
55	100	97	50
56	100	98	50
57	90	99	50
58	85	100	50
59	85	101	50
60	80	102	50
61	80	103	50
62	75	104	50
63	75	105	50
64	75	106	50
65	75	107	50
66	75	108	50
67	75	109	50
68	75	110	50

[fol. 145]

69	75	111	50
70	75	112	50
71	75	113	50
72	75	114	50
73	75	115	50
74	75	116	50
75	70	117	50
76	65	118	50
77	65	119	50
78	65	120	50
79	60	121	50
80	60	122	50

123 50
124 50
125 50
126 50
127 50
128 50
129 50
130 50
131 50
132 50
133 50
134 50
135 50
136 50

[fol. 146]

137 50
138 50
139 50
140 45
141 45
142 45
143 45
144 45
145 45
146 45
147 45
148 45
149 45
150 40
151 40
152 40
153 40
154 40
155 40
156 40
157 40
158 40
159 40
160 40
161 40
162 40
163 40
164 40
165 40
166 40
167 40
168 40
169 40
170 40
171 40
172 40
173 40
174 40
175 40
176 40
177 40
178 40
179 40
180 40
181 40
182 40
183 40
184 40
185 40
186 40
187 40
188 40
189 40
190 40
191 40
192 40
193 40
194 40
195 40
196 40
197 40
198 40
199 40
200 40
201 35
202 35
203 35
204 35
205 35
206 35

[fol. 147]

207	35	247	30
208	35	248	30
209	35	249	30
210	35	250	30
211	35	251	30
212	35	252	30
213	35	253	30
214	35	254	30
215	35	255	30
216	35	256	30
217	35	257	30
218	35	258	30
219	35	259	30
220	35	260	30
221	35	261	30
222	25	262	30
223	35	263	30
224	35	264	30
225	35	265	30
226	35	266	30
227	35	267	30
228	35	268	30
229	35	269	30
230	35	270	30
231	35	271	30
232	35	272	30

[fol. 148]

233	35	273	30
234	35	274	30
235	35	275	30
236	35	276	30
237	35	277	30
238	35	278	30
239	35	279	30
240	35	280	30
241	30	281	30
242	30	282	30
243	30	283	30
244	30	284	30
245	30	285	30
246	30	286	30

287	30	329	25
288	30	330	25
289	30	331	25
290	30	332	25
291	30	333	25
292	30	334	25
293	30	335	25
294	30	336	25
295	30	337	25
296	30	338	25
297	30	339	25
298	30	340	25

[fol. 149]

299	30	341	25
300	25	342	25
301	25	343	25
302	25	344	25
303	25	345	25
304	25	346	25
305	25	347	25
306	25	348	25
307	25	349	25
308	25	350	25
309	25	351	25
310	25	352	25
311	25	353	25
312	25	354	25
313	25	355	25
314	25	356	25
315	25	357	25
316	25	358	25
317	25	359	25
318	25	360	25
319	25	361	25
320	25	362	25
321	25	363	25
322	25	364	25
323	25	365	25
324	25	366	25
325	25	367	25
326	25	368	25
327	25	369	25
328	25	370	25

371	25	411	20
372	25	412	20
373	25	413	20
374	25	414	20
375	25	415	20
376	25	416	20
377	25	417	20
378	20	418	20
379	20	419	20
380	20	420	20
381	20	421	20
382	20	422	20
383	20	423	20
384	20	424	20
385	20	425	20
386	20	426	20
387	20	427	20
388	20	428	20
389	20	429	20
390	20	430	20
391	20	431	20
392	20	432	20
393	20	433	20
394	20	434	20
395	20	435	20
396	20	436	20
397	20	437	20
398	20	438	20
399	20	439	20
400	20	440	20
401	20	441	20
402	20	442	20
403	20	443	20
404	20	444	20
405	20	445	20
406	20	446	20
407	20	447	20
408	20	448	20

[fol. 150]

409	20	449	20
410	20	450	20

451	20	491	15
452	20	492	15
453	20	493	15
454	20	494	15
455	20	495	15
456	20	496	15
457	20	497	15
458	20	498	15
459	20	499	15
460	20	500	15
461	20	501	15
462	20	502	15
463	20	503	15
464	20	504	15
465	20	505	15
466	20	506	15
467	20	507	15
468	20	508	15
469	20	509	15
470	20	510	15

[fol. 151]

471	20	511	15
472	20	512	15
473	20	513	15
474	20	514	15
475	20	515	15
476	20	516	15
477	20	517	15
478	20	518	15
479	20	519	15
480	15	520	15
481	15	521	15
482	15	522	15
483	15	523	10
484	15	524	10
485	15	525	10
486	15	526	10
487	15	527	10
488	15	528	10
489	15	529	10
490	15		

[fol. 152] Subscription agreement for stock offered for subscription under employee's stock subscription plan of the American Tobacco Company, 1931, between the company, the respective employees, and Junius Parker, Esq., and Guaranty Trust Company of New York, Trustees

New York, N. Y., January 31, 1931.

To —— ——:

Under the Employees' Stock Subscription Plan approved at a Special Stockholders' Meeting of The American Tobacco Company (hereinafter refered to as the "Company") on July 28, 1930, there have been allotted to you (you are hereinafter referred to as the "Participant" and you and others subscribing for stock now offered under said Plan are hereinafter collectively referred to as "Participants"), for subscription and purchase by you, by way of additional compensation for services to be rendered by you to the Company and/or its subsidiaries to and including December 31, 1931, — shares (hereinafter called the "Stock") of the Common Stock B of the Company upon the following terms and conditions, to wit:

1. Price.—The Stock is offered to the Participant for subscription at $25 per share.

2. Trustees.—An agreement has been entered into by the Company dated January 30, 1931 (a copy of which is hereto annexed marked Schedule "1"), appointing the [fol. 153] undersigned Guaranty Trust Company of New York and Junius Parker, Trustees. The Participant hereby approves and ratifies said agreement and agrees to be bound by the terms thereof and consents and agrees that the Trustees and the Company may take any action thereby authorized or permitted.

The word "Trustees" when used herein refers to the said Guaranty Trust Company of New York and Junius Parker as such Trustees and/or their respective successor and/or successors as such Trustees.

3. Loan, Pledge of Stock, etc.—For the purpose of purchasing from the Company and carrying the stock allotted to and subscribed for by Participants under said Plan

until the same has been paid for by the respective Participants, a loan or loans have been or will be negotiated by the Trustees, in an aggregate amount equal to $25 per share on the number of shares of Common Stock B of the Company allotted to and subscribed for by Participants. The proceeds of such loan or loans shall be used to purchase from the Company at $25 per share, the stock allotted to and subscribed for by Participants. Said Trustees shall accept payments from the Participants and make delivery of the Stock in accordance with the terms hereof. The Trustees shall have the right to make said loan or loans and any loan or loans in renewal or substitution therefor in whole or in part, on such terms and conditions, at such rate of interest and otherwise as in their uncontrolled discretion they may deem advisable, and shall have the right to pledge as security for such loan and/or any [fol. 154] loan obtained by them in renewal or substitution therefor in whole or in part, all or any part of any stock subscribed for by the Participants (including any stock dividends thereon and any stock and/or other securities purchased by the Trustees on the exercise of rights as provided herein) as well as the Subscription Agreements of Participants, provided that any such stock subscribed for by Participants and any stock dividends thereon and stock and other securities purchased under rights issued in connection therewith, and any such Subscription Agreement of any Participant, so pledged, shall be withdrawn by the Trustees from such pledge when payment in full of the purchase price of such stock, including interest, shall have been made by such Participant subscribing therefor.

4. Interest.—The Participant shall pay interest to the Trustees on all unpaid balances of the purchase price, at such rate not in excess of six per centum per annum as the Trustees may fix from time to time.

5. Terms of Payments.—The purchase price shall be paid by the Participant to the Trustees in quarterly instalments of $1.25 per share on the first days of March, June, September and December, which payments will be applied against the purchase price and interest thereon.

The quarterly cash dividends and extra cash dividends, if any, paid on the Stock and on stock dividends paid on

the Stock and on stock purchased under rights issued with respect thereto shall be applied by the Trustees to the pay-
[fol. 155] ment of such purchase price and interest. As long as cash dividends on the Common Stock B at or in excess of the present rate of $1.25 per share per quarter are paid by the Company, such application thereof upon the purchase price and interest shall constitute compliance with the above requirement for quarterly payments. The Participants shall have the right to make additional payments on the purchase price at any time and from time to time until the purchase price of the Stock and interest thereon is paid in full.

6. Place of Payment.—All payments are to be made in New York funds to Guaranty Trust Company of New York, 140 Broadway, New York, N. Y.

7. Delivery of Stock.—The stock certificates shall not be delivered by the Trustees to the Participant until the purchase price of the Stock and all interest accrued thereon shall have been paid in full and in any event shall not be delivered to the Participant until after December 31, 1931, nor shall the Participant be or be deemed to be the owner of the Stock or of any stock dividends thereon or of stock or other securities purchased under rights issued in connection therewith, until he becomes entitled to delivery thereof under the terms of this Subscription Agreement and the stock certificates and other securities, if any, are delivered to him.

8. Voting Rights.—All voting rights, if any, on the Stock and on stock dividends paid on the Stock and on stock purchased under rights issued with respect thereto are to be vested in the Trustees or their successors until the pur-
[fol. 156] chase price of the Stock and all interest accrued thereon is paid in full.

9. Stock Dividends.—Any stock dividends which may be paid by the Company upon the Stock shall be added to and deemed to be a part of the Stock, and any cash dividends paid thereon shall be applied against the purchase price of the Stock and interest. When payment in full of the purchase price of the Stock and all interest accrued thereon shall have been made by the Participant and he shall have

become entitled to the delivery thereof pursuant to the terms hereof, such stock dividends shall be delivered to the Participant at the same time that delivery is made of the Stock subscribed for hereunder. The words "stock dividends paid on the Stock" or equivalent expressions when used herein shall be deemed to include stock dividends on stock received as stock dividends and stock dividends on stock purchased on the exercise of rights issued in connection with the Stock. If any recapitalization of the Company shall occur effecting a change of the Common Stock B into a different number of shares or into shares of any other class or otherwise, the shares covered by this Subscription Agreement shall be correspondingly changed into shares resulting from such change.

10. Rights.—In the event that before delivery of the Stock to the Participant, the Company issues rights to the holders of Common Stock B to purchase any new or additional issue of stock of the Company or other stock or securities, the Trustees may, at their option, as to the rights so issued with respect to the Stock:

[fol. 157] (a) exercise such rights and purchase the stock or other securities offered thereunder, for the benefit of the Participant, in which case the amount of purchase price payable by the Participant hereunder shall be increased by the amount of the cost of the stock or other securities purchased by the Trustees under such rights for the account of the Participant, plus interest; when payment in full of the purchase price of the Stock as so increased and all interest accrued thereon, shall have been made and the Participant shall have become entitled to the delivery of the Stock pursuant to the terms hereof, such stock or other securities so purchased under such rights for the account of the Participant shall be delivered to the Participant at the same time that delivery is made of the Stock subscribed for hereunder; or

(b) sell such rights and apply the proceeds of such sale upon the purchase price of the Stock.

The Trustees may, but shall not be required to, permit the Participant to determine in each instance whether he desires the rights issued with respect to the Stock exercised or sold.

The words "rights issued with respect to the Stock" or equivalent expressions when used herein shall be deemed to include rights issued with respect to stock dividends paid on the Stock and rights issued with respect to stock purchased by the Trustees on the exercise of rights issued with respect to the Stock.

The words "purchase price of the Stock" when used herein shall be deemed to refer to the purchase price as increased as provided in subdivision (a) of this Paragraph 10.

[fol. 158] 11. Discharge or Resignation; Default; Etc.—In the event that

(a) prior to December 31, 1931, the connection of the Participant with the Company or any subsidiary, as the case may be, is severed by discharge either with or without cause, or resignation, or in any manner other than death, so that he is no longer in the employ of the Company or one or more of its subsidiaries, nor actively engaged in the conduct of the business; or

(b) at any time before the purchase price of the Stock is paid in full default is made in the making of any payment due by the Participant or his personal representatives hereunder and such default continues for thirty days after written notice thereof is mailed to him by the Trustees by registered mail addressed to the Participant or his personal representatives at his address as set forth below his signature on the Acceptance attached hereto; or

(c) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, any assignment, transfer, hypothecation or pledge of, or attempt to assign, transfer, hypothecate or pledge, the Stock of any part thereof, or any stock dividends thereon or any stock or other securities purchased by the Trustees on the exercise of rights issued with respect thereto, or any interest of Participant therein or in this agreement, is made by or on behalf of the Participant or his personal representatives; or

[fol. 159] (d) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, the Stock or any part hereof, or any stock dividends thereon, or any stock or other securities

purchased by the Trustees on the exercise of rights issued with respect thereto, or any interest of the Participant therein or in this agreement, is sold or attempted to be sold by process of law; or

(e) at any time before the Participant become entitled under the terms hereof to delivery of the certificates for the Stock, the Participant becomes insolvent or bankrupt; then in any such event this Subscription Agreement of all rights of the Participant hereunder shall forthwith be subject to cancellation at the election of the Trustees, to be evidenced by written notice mailed to the Participant at the address set forth below his signature on the Acceptance attached hereto, and in the event of such cancellation the Participant shall have no further right, interest or claim of any kind hereunder, or in or to the Stock or any stock or other securties referred to herein or to which this agreement may relate, and shall not be entitled to purchase nor to the delivery of any stock or other securities hereunder, notwithstanding that there may have been paid by him or credited to him from dividends or otherwise, part or all of the purchase price of the Stock, excepting only that the Participant shall be entitled to be reimbursed by the Trustees for the amount of money, if any, which he shall have paid out of pocket to the Trustees on account [fol. 160] of his subscription hereunder, plus interest on such amount at such rate not to exceed six per centum per annum as the Board of Directors of the Company may determine, but such reimbursement to him shall not include nor shall he have any right, interest or claim of any kind in or to any cash dividends on the Stock or on any stock received by the Trustees as stock dividends or purchased under rights, or in or to any other cash, stock, securities or other property which may have been or may be received by the Trustees in any manner hereunder, the rights of the Participant in the event of such cancellation being limited strictly to reimbursement of his out of pocket payments and interest thereon as aforesaid. The Trustees may in their uncontrolled discretion waive such right of cancellation as to all or any part of the Stock subscribed for by the Participant, including stock dividends and stock or other securities purchased under rights, if any.

12. Death.—No rights of the Participant hereunder shall survive the death of the Participant, except as expressly hereinafter provided in this Paragraph 12.

(a) In the event of the death of the Participant prior to December 31, 1931, while in the employ of the Company and/or of a subsidiary or actively engaged in the conduct of the business of the Company and/or of a subsidiary and while this agreement is in effect, his personal representatives shall be entitled to purchase so much of the Stock (and a pro rata amount computed on the same ratio, of [fol. 161] any stock dividends issued thereon and any stock or other securities purchased under rights issued with respect thereto up to and including the date of such death), as shall bear the same ratio to the total number of shares of the Stock subscribed for by him (exclusive of stock dividends issued thereon and stock or other securities purchase- under rights as aforesaid) as the number of days which shall have elapsed after January 1, 1931 to the date of his death bears to three hundred and sixty-five, at a pro rata of the purchase price of the Stock subscribed for by him, determined on the same ratio (plus the cost of the pro rata amount, if any, computed on the same ratio, of stock or other securities purchase- under rights issued with respect to the stock, as aforesaid), with credit of any cash dividends paid on such pro rata amount of stock to such date, also determined on the same ratio, and shall be entitled to continue to make payments in the manner hereinabove provided until such purchase price of such pro rata amount of stock and any interest accrued thereon shall have been paid in full, when such personal representatives shall be entitled to receive such pro rata amount of stock determined as aforesaid. In case such personal representatives of such deceased Participant do not desire to purchase such pro rata amount of stock, they may, within six months after such death, request the Trustees to sell such pro rata amount of stock, determined as aforesaid, at the then market price, and the proceeds of such sale (after deducting any unpaid balance of the purchase price due on such pro rata amount of stock, together with interest accrued thereon) shall be paid, if any, to such personal representa- [fol. 162] tives. The personal representatives of a deceased Participant shall be conclusively presumed to have

elected to purchase such pro rata amount of stock, under the foregoing provisions of this subdivision (a), unless they make such request for sale within six months after the death of such Participant.

(b) In the event of the death of the Participant on or after December 31, 1931 and while this agreement is in effect, his personal representatives shall have the right to continue to make payments to the Trustees in the same manner and on the same terms applicable hereunder to the Participant during his lifetime, until the purchase price of the Stock and any interest accrued thereon shall have been paid in full, when such personal representatives shall be entitled to receive the Stock, together with any stock dividends thereon and stock or other securities purchased under rights, if any. In case the personal representatives shall not desire to continue to make such payments, they may, within six months after such death, request the Trustees to sell the Stock, including any stock dividends and any stock or other securities purchased under rights, if any, at the then market price, and the proceeds of such sale (after deducting any unpaid balance of the purchase price due on the Stock, together with interest) shall be paid, if any, to such personal representatives. The personal representatives of a deceased Participant shall be conclusively presumed to have elected to continue to make such payments and to purchase the Stock under the foregoing provisions of this subdivision (b) unless they make such request for sale within six months after the death of such Participant.

[fol. 163] 13. In any case in which an amount of stock deliverable by the Trustees under this agreement or to which this agreement may at any time relate includes a fractional share, the Trustees shall have the discretionary right to adjust such fraction either by a cash payment or by sale or purchase of such fraction, or in such other manner as they in their discretion may determine.

14. The Stock subscribed for hereunder has been allotted to the Participant as additional compensation as aforesaid for services to be rendered by him, and neither this agreement nor the Stock (including any stock dividends thereon and any stock or other securities purchased by the Trustees on the exercise of rights issued in connection therewith)

nor any of the rights of the Participant nor of his personal representatives hereunder, shall be subject to sale, transfer, assignment, pledge or hypothecation by him or his personal representatives until the Participant shall have become entitled to and shall actually have received delivery of the Stock certificates under the terms hereof.

15. The Trustees may construe any of the provisions of this Subscription Agreement, and any construction placed upon any provision hereof by the Trustees in good faith shall be binding upon the Participant and his personal representatives, and upon the Company.

16. In addition to any other rights of cancellation provided herein, the Trustees shall have the discretionary right at any time, at the request of the Participant or his [fol. 164] personal representatives, to cancel the subscription hereby evidenced in whole or in part, upon such terms as the Trustees may determine.

17. The Trustees at their option in any instance before exercising any discretion vested in them hereunder, may consult with or act upon the advice of the officers or Board of Directors of the Company, and the action of the Trustees in relying or acting upon such advice and decision shall be deemed to be an exercise of their discretion within the terms hereof.

If you desire to avail yourself of this offer, please fill out and sign the acceptance of this Subscription Agreement on the enclosed duplicate, and forward the same to Guaranty Trust Company of New York, 140 Broadway, New York, N. Y., attention of Trust Department, and this Subscription Agreement and such Acceptance will thereupon constitute an agreement on the terms hereinabove set forth.

Guaranty Trust Company of New York, by —— ——, Vice-President. —— ——, Trustees. The American Tobacco Company, by —— ——, Vice-President.

[fol. 165] Acceptance of Subscription Agreement

February —, 1931.

Guaranty Trust Company of New York, Junius Parker, trustees under agreement of January 30, 1931

Dear Sirs: I hereby subscribe for — shares of the Common Stock B of The American Tobacco Company in accordance with the terms and conditions outlined in the foregoing Subscription Agreement.

Yours very truly, Signature: —— ——, Street: ——, Town or City: ——, State: ——.

[fol. 166] Schedule I

Agreement made this 30th day of January, 1931, between The American Tobacco Company, a New Jersey corporation, having an office at No. 111 Fifth Avenue, Borough of Manhattan, City and State of New York (hereinafter called the "Company"), party of the first part, and Guaranty Trust Company of New York, a corporation organized under the Banking Laws of the State of New York, having its principal office at No. 140 Broadway, Borough of Manhattan, City and State of New York (hereinafter sometimes called the "Corporate Trustee"), and Junius Parker, of 41 East 42nd Street, Borough of Manhattan, City and State of New York (hereinafter sometimes called the "Individual Trustee"), the said Guaranty Trust Company of New York and Junius Parker and their respective successors being hereinafter sometimes collectively referred to as the "Trustees"):

Whereas, the stockholders of the Company at a special meeting of stockholders held on July 28, 1930, duly approved and adopted by a vote of more than two-thirds of each class of stock, an Employees' Stock Subscription Plan, and authorized, directed and empowered the President, the Board of Directors and other proper officers of the Company to take all such steps and to do any and all acts and things authorized by the terms of said Plan, as well as any and all such other acts and things as might be necessary and proper to execute and carry out the full intent and purpose of the Plan and of such resolution of the stockholders, and

[fol. 167] Whereas, by appropriate action of the Board of Directors pursuant to said Plan, an aggregate not in excess of 56,712 shares of the Common Stock B of the Company have been offered and allotted for subscription in various respective amounts to certain employees of the Company and/or its subsidiaries and to those actively engaged in the conduct of its or their business, at $25 per share, as additional compensation for services to be rendered by them to and including December 31, 1931, and

Whereas, such respective allotments are set forth in an instrument signed by the President and attested by the Secretary or an Assistant Secretary of the Company, and delivered to the Trustees simultaneously with the execution and delivery of this agreement, and

Whereas, the terms and conditions upon which such stock is allotted to and may be purchased by such employees and persons actively engaged in the business are set forth in a Subscription Agreement to be executed by such individuals to whom stock is allotted and who subscribe therefor (the employees and persons actively engaged in the conduct of the business to whom stock is allotted under said Plan and who execute said Subscription Agreement being sometimes hereinafter referred to as "Participants"), copy of which Subscription Agreement is hereto annexed marked Exhibit "A" and made a part hereof, and

Whereas, it is deemed convenient and advisable for the purpose of executing and carrying out this Plan, that the stock so allotted for subscription under the Plan and sub-[fol. 168] scribed for by Participants be in the first instance issued to and purchased by Trustees, and that a trust be created for such purpose on the terms and conditions hereinafter contained,

Now, therefore, this indenture witnesseth:

That in consideration of the premises, the mutual covenants herein contained and of the sum of One dollar ($1) in hand paid to each of the Trustees at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties hereto hereby agree as follows:

1. Pursuant to the authority hereby and by the Subscription Agreement Exhibit "A" vested in them, the Trustees have negotiated a loan with and will borrow from Guaranty

Trust Company of New York an amount equal to $25 per share on the number of shares of Common Stock B of the Company allotted to and subscribed for by Participants executing said Subscription Agreements in the form set forth in Exhibit "A"; said loan will bear interest at a rate not in excess of six percentum (6%) per annum and will be evidenced by an instrument or loan agreement in form mutually satisfactory to the Trustees, the Company and said Guaranty Trust Company of New York and conforming to the provisions of this Agreement and of the Subscription Agreements, and will be secured by the shares of Common Stock B of the Company purchased by and delivered to the Trustees and referred to in paragraph 2 hereof and by the Subscription Agreements.

[fol. 169] 2. Promptly upon subscription therefor by Participants, the Company will sell and deliver to the Trustees and the Trustees will buy from the Company, at the price of $25 per share, the number of shares of Common Stock B of the Company, not in excess of an aggregate of 56,712 shares, allotted to and subscribed for, by Participants executing Subscription Agreements in the form set forth in Exhibit "A"; the funds to be used by the Trustees in making payment for said stock to be the proceeds of the loan referred to in paragraph 1 hereof.

3. The Trustees hereby agree that, subject to the terms of this agreement, said shares of stock of the Company will be acquired by them as aforesaid in trust and will be held and disposed of by the Trustees pursuant to the provisions of this agreement and the Subscription Agreements with Participants in the form Exhibit "A." The Company consents and agrees that the Trustees shall make delivery of the stock aforesaid in accordance with the terms of said Subscription Agreements in the form Exhibit "A" and in accordance with the terms of this Agreement.

4. The Trustees shall be empowered to borrow money for the purpose of making payment to the Company for the stock allotted to and subscribed for by Participants executing Subscription Agreements in the form of Exhibit "A," and in the event that the Company issues rights to its stockholders to purchase any new or additional issue of stock of the Company and/or other securities, the

[fol. 170] Trustees may exercise such rights and borrow additional money for such purpose. The making of the loan hereinabove referred to by the Trustees from the Guaranty Trust Company of New York is hereby ratified and approved. Any renewal of said loan or any loan made in substitution for said loan, in whole or in part, and any subsequent loan or loans may be made by the Trustees either from the Guaranty Trust Company of New York or from any other individual, firm or corporation in the discretion of the Trustees and upon such terms and conditions as to interest, maturity, security, default and otherwise, as the Trustees may from time to time in their judgment approve and agree to. The Trustees shall have authority to pledge as security for any such loan all or any part of any shares of stock then subscribed for but not paid for in full by Participants and any stock dividends paid thereon and/or any stock and/or other securities purchased under rights issued in connection therewith, as well as any Subscription Agreements executed by Participants and not performed in full, but the agreement or other instrument, evidencing any such loan, shall contain appropriate provisions so that when any Participant shall have made payment in full for the stock subscribed for by him including any stock or other securities, if any, purchased under rights issued in connection with the stock subscribed for by him and becomes entitled to the delivery thereof under the terms of the Subscription Agreement executed by him, such stock and Subscription Agreement, including any stock dividends and/or stock and/or other securities, purchased under rights, to which he may be entitled, shall be sub- [fol. 171] ject to withdrawal from the pledge of such loan; and shall also contain provisions so that any stock and/or other securities, which by reason of the death of a Participant, the cancellation of a Subscription Agreement or in any other manner whatsoever is not, under the terms of the Subscription Agreements and/or of this Agreement, to be delivered to a Participant, shall be subject to withdrawal by the Trustees from the pledge of such loan, together with any Subscription Agreement relating thereto, to the end that the Trustees may make such delivery or disposition of any such stock and/or other securities as may be authorized under the terms of the Subscription Agreements and/or of this Agreement.

5. The Company ratifies and approves all of the terms of the Subscription Agreement in the form of Exhibit "A" hereto annexed, and agrees to be bound by the terms of all agreements in said form Exhibit "A" executed by Participants.

6. In the event that by reason of death, cancellation of a Subscription Agreement or in any other manner, any shares of stock and/or other securities acquired by the Trustees under the terms hereof, either by purchase from the Company or as a stock dividend or otherwise, shall, under the terms of the Subscription Agreements and/or of this Agreement, not be deliverable to a Participant or his personal representatives, such stock and/or other securities shall be delivered by the Trustees to and accepted by the Company against payment by the Company to the Trustees of the net cost thereof to the Trustees in determining which [fol. 172] net cost there shall (without limiting the generality of such term) be taken into account the original cost thereof and interest paid by the Trustees upon so much of any loan as is attributable to the amount of the cost thereof, and any amounts paid by the Trustees to the Participant by way of interest on out-of-pocket payments of such Participant repaid to him under the terms of the Subscription Agreement relating to such stock and/or other securities.

7. The Company hereby agrees to indemnify the Trustees and hold them harmless against any claim, damage or loss of any kind based on any act done by them or either of them under or in pursuance of this Agreement, or the Subscription Agreements, except in case of gross fraud or wilful misfeasance.

8. The Individual Trustee agrees to serve hereunder without commissions or compensation of any kind, all of which he hereby, on behalf of himself and his personal representatives, waives. The Corporate Trustee shall receive reasonable compensation to be paid by the Company, the amount of which shall be agreed upon between the Company and the Corporate Trustee. The reasonable expenses and disbursements of the Trustees shall be paid by the Company.

9. In the event of the death, resignation or incapacity or inability for any reason of the Individual Trustee or any

successor succeeding him as Trustee under the trust, to continue in such capacity, the Company shall appoint his [fol. 173] successor. In the event of the resignation or inability for any reason to act of the Corporate Trustee or any trustee succeeding it as trustee under the trust, its successor shall be appointed by the Company. The Company may at any time remove either Trustee or any successor trustee, with or without cause, and appoint a successor to the Trustee or Trustees so removed. The removal by the Company of any Trustee or successor trustee and the appointment of a successor trustee either in the event of such a removal or in the event of the death, resignation or incapacity or inability for any reason of a trustee to continue in such capacity, shall be evidenced by resolution of the Board of Directors of the Company exercising such right of removal and/or appointment. Any Trustee or successor trustee upon receiving a certified copy of a resolution of the Board of Directors of the Company exercising such right of removal and/or of appointment of a successor, shall deliver to his or its successor so appointed all certificates of stock, money, books, papers and/or property, documents and records of any kind belonging to or relating to the trust hereby created then in his or its possession or under his or its control. Every such trustee appointed in place of the Individual Trustee or his successor in the trust shall be an individual. Every such trustee appointed in place of the Corporate Trustee or its successor in the trust shall be a properly qualified bank or trust company in good standing having an office in the Borough of Manhattan, if there be such a bank or trust company willing and able to accept the trust upon reasonable and customary terms.

[fol. 174] 10. The word "Trustee" whenever used herein shall be deemed to refer to the Trustees herein named and their respective successor or successors. The term "Individual Trustee" whenever used herein shall be deemed to refer to the individual trustee named herein and any individual succeeding to him as trustee hereunder. The term "Corporate Trustee" whenever used herein shall be deemed to refer to the corporate trustee named herein, and any bank or trust company succeeding to it as corporate trustee hereunder.

11. The Trustees may employ agents and attorneys in and about the performance of any of their duties hereunder or under said Subscription Agreements and shall not be answerable for the default or misconduct of any such agent or attorney apppointed by them in pursuance thereof if such agent or attorney shall have been selected with reasonable care.

The Trustees may construe any of the provisions of this Agreement and of the Subscription Agreements in so far as the same may appear to be ambiguous or inconsistent with any other of the provisions of either of such Agreements, and any construction so placed upon any provision hereof by the Trustees in good faith and in accordance with the advice of counsel shall be binding upon the Company and upon all Particiipants.

The Trustees may at any time and from time to time enter into an agreement or agreements supplemental hereto, with the Company, curing any defect or supplying any omission in or from any of the provisions of this Agreement, and any such supplemental agreement so entered into in good faith and in accordance with the advice of counsel shall be binding upon all Participants.

[fol. 175] The Trustees shall not be liable for any error of judgment or for any act done or steps taken or omitted by them in good faith, or for any mistake of fact or of law, or for anything which they may do or refrain from doing in connection herewith, except only for their own wilful default.

The Trustees may advise with legal counsel and any action under this Agreement taken or suffered in good faith by the Trustees in accordance with the opinion of such counsel shall be conclusive upon the Company and upon Participants, and the Trustees shall be fully protected with respect thereto.

The Trustees shall incur no liability for but shall be protected with respect to any and all acts done or actions taken, suffered or omitted by them in reliance upon any notice, consent, approval, certificate, affidavit, statement or other instrument delivered to them pursuant to any of the provisions of this Agreement, or otherwise, and believed by them to be genuine, and to have been made, signed, executed, verified, certified, issued, given or delivered by the proper person or persons; and the Trustees shall be

under no duty to make any investigation or inquiry as to any statement contained in any such instrument, but may accept the same as conclusive evidence of the truth thereof.

The Trustees shall not be liable for any taxes, assessments or other charges whatsoever.

The Trustees shall not be responsible for the authorizing, validity or sufficiency of the title to any certificates of stock received, held or disposed of by them hereunder.

12. The trust hereby created shall continue for such time as may be necessary to accomplish the purposes for which [fol. 176] it is created and shall in any event terminate when all of the shares of stock are allotted and subscribed for by Participants under Subscription Agreements in the form of Exhibit "A" and any stock dividends thereon and stock and/or other securities purchased under rights in connection therewith shall have been delivered to Participants and/or returned to the Company.

13. Any property, stock, securities or money remaining in the possession or under the control of the Trustees hereunder upon the termination of the trust created hereby shall be delivered and/or paid by the Trustees to the Company.

14. This agreement shall be binding upon and enure to the benefit of the Trustees and their respective successor and successors as such Trustees, and the Company, its successors and assigns.

In witness whereof these presents have been duly executed by the parties hereto the day and year first above written.

The American Tobacco Company, by George W. Hill, President.

Attest: J. Raymond Cummings, Assistant Secretary. (Corporate Seal.) Guaranty Trust Company of New York, by M. P. Callaway, Vice-President. Attest: Leo B. Bieher, Assistant Secretary. (Corporate Seal.) Junius Parker. (L. S.)

Exhibit "A", referred to in the above Trust Agreement Schedule 1, is identical with the Subscription Agreement hereinabove contained.

[fol. 177] IN UNITED STATES DISTRICT COURT

In Equity. 60-94

[Title omitted]

Consolidated Cause

AFFIDAVIT OF J. ARTHUR LEVE

[Referring to Order of Consolidation]

STATE OF NEW YORK,
County of New York, ss:

J. Arthur Leve, being duly sworn, deposes and says:

1. I am a member of the firm of Chadburne, Stanchfield & Levy, attorneys for the defendants George W. Hill, C. F. Neiley and Vincent Riggio.

2. Attached hereto are true copies of stipulations signed by plaintiff, sua persona and the attorneys for the defend-[fol. 178] ants in the above-entitled causes, and the order of the Hon. Alfred C. Coxe signed November 24, 1931, consolidating into one action in this Court, the above-entitled causes and directing that the amended complaint heretofore served in Richard Reid Rogers v. George W. Hill, et al. (Equity 59-115) shall serve as an amended complaint in Richard Reid Rogers v. Thomas R. Taylor, et ano. (Equity 60-94).

3. The original of this order signed by the Hon. Alfred C. Coxe was duly filed with the Clerk of this Court on November 24, 1931, as a perusal of the records of this Court will disclose.

4. An examination of the files in this consolidated cause discloses that the originals of the stipulations and orders have either been lost or mislaid and are not now available on a motion which is to be heard in this Court on January 15, 1932.

J. Arthur Leve.

Sworn to before me this 13th day of January, 1932. W. Caverly, Notary Public, New York County. N. Y. Co. Cl'ks No. 329, Reg. No. 3C383. Commission expires March 30, 1933. (Seal.)

[fol. 179] IN UNITED STATES DISTRICT COURT

E-59-115

RICHARD REID ROGERS, Plaintiff,

against

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. Riggio, and The American Tobacco Company, Defendants

E-60-94

RICHARD REID ROGERS, Plaintiff,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants

ORDER OF CONSOLIDATION—NOV. 24, 1931

Upon the annexed stipulation signed by the plaintiff, sua persona, and the attorneys for the defendants, in the above entitled causes,

It is ordered that

1. The above entitled causes be consolidated into one action in this Court and that the orders and proceedings [fol. 180] heretofore had in said causes are hereby made orders and proceedings in this cause, and that the consolidated cause receive the title of Richard Reid Rogers, Plaintiff, against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, Defendants (In Equity No. 60-94, Consolidated Cause).

2. The amended complaint heretofore served in Richard Reid Rogers v. George W. Hill, et al. (E. 59-115) shall serve as an amended complaint in Richard Reid Rogers v. Thomas R. Taylor, et ano. (E. 60-94), and that any answer or answers filed by the defendants in said Hill case (E. 59-115) shall be deemed for all purposes as an answer to the Taylor case (E. 60-94).

3. The time of the defendants Hill, Neiley, Riggio, Taylor, and The American Tobacco Company, to move, answer, or plead to each of the complaints herein, viz., the amended

complaint — the Hill case (E. 50-115), which shall serve also as the amended complaint in the Taylor case (E. 60-94), shall be extended to and including December 8, 1931.

(Sgd.) Alfred C. Coxe, United States District Judge.

[fol. 181] In United States District Court

E-59-115. E-60-94

[Titles omitted]

Stipulation as to Consolidation

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, as follows, that:

1. The above entitled causes be consolidated into one action in this Court and that the orders and proceedings heretofore had in said causes are hereby made orders and proceedings in this cause, and that the consolidated cause receive the title of Richard Reid Rogers, Plaintiff against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, Defendants (In Equity No. 60-94, Consolidated Cause).

[fol. 182] 2. The amended complaint heretofore served in Richard Reid Rogers v. George W. Hill, et al. (E. 59-115) shall serve as an amended complaint in Richard Reid Rogers v. Thomas R. Taylor, et ano. (E. 60-94), and that any answer or answers filed by the defendant in said Hill case (E. 59-115) shall be deemed for all purposes as an answer to the Taylor case (E. 60-94).

3. The undersigned defendants' time to move, answer, or plead to each of the complaints herein, viz., the amended complaint in the Hill case (E. 59-115), which shall serve also as the amended complaint in the Taylor case (E. 60-94), shall be extended to and including December 8, 1931.

Dated New York, November 23, 1931.

(Sgd.) Richard Reid Rogers, Plaintiff, sua Persona.
(Sgd.) Chadbourne, Stanchfield & Levy, Attorneys for Defendants, Hill, Neiley, Riggio, Taylor, and the American Tobacco Company.

So ordered 11/24/31.

(Sgd.) Alfred C. Coxe, United States District Judge.
(Sgd.) C. W.

[fol. 183] STATE OF NEW YORK,
County of New York, ss:

On this 23rd day of November, 1931, before me personally appeared Richard Reid Rogers, to me known and known to me to be the person who duly executed the foregoing stipulation, and he duly acknowledged to me that he executed the same.

Anderson Woods, Notary Public, Kings Co., No. 335. Cert. filed in N. Y. Co. No. 395. Comm. expires March 30, 1933. (Seal.)

[fol. 184] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity

RICHARD REID ROGERS, Plaintiff,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants

COMPLAINT

[Superseded by Amended Complaint in Rogers v. Hill et al., E 59-115, Pursuant to Order of Consolidation]

The plaintiff, who sues on behalf of himself and all other stockholders of the defendant, The American Tobacco Company, who choose to come in and contribute to the costs and expenses of this action, alleges:

1. He is a citizen of New York and the owner and registered owner of 200 shares of the Common Stock of defendant company acquired in 1916, and 400 shares of the Common Stock B of said company acquired since 1925.

2. The defendant Taylor is a resident and citizen of the State of New Jersey.

3. The American Tobacco Company is a corporation organized under the laws of New Jersey prior to 1905, and is engaged in the manufacture and sale of tobacco products.

[fol. 185] 4. The value of the matter in controversy in this action is in excess of Three thousand Dollars ($3,000) exclusive of interest, costs and disbursements; and there is no collusion between the plaintiff and the defendants to confer jurisdiction on this court.

5. On the first of January, 1931, the capital structure of the defendant, The American Tobacco Company, was as follows: Preferred Stock having a par value of $100 a share, authorized $54,010,600, outstanding $52,699,700; Common Stock having a par value of $25 a share, authorized $50,000,000, outstanding $40,242,400; Common Stock B having a par value of $25 a share, authorized $100,000,000, outstanding $76,933,950. In addition, it had outstanding on that date bonds of the par value of $1,064,350. Its current liabilities were approximately $5,000,000, and its current quick assets were approximately $147,000,000.

6. The Common Stock B was authorized by an amendment of the charter in 1920. It has the same financial status as the Common Stock, but no voting rights on corporate management.

7. The defendant Taylor is and has been since sometime in 1929 a director and vice-president of the defendant, The American Tobacco Company.

8. On information and belief the defendant Taylor received from the defendant The American Tobacco Company from the year 1929 to and including the present time a fixed salary as vice-president of said company of not [fol. 186] less than $25,000 per annum. In addition he received insurance, sick benefits and pension rights at the expense of the company of substantial value, but in amounts at the present time unknown to the plaintiff. The defendant Taylor also claims the right by way of additional compensation to participate in the current year to the extent of approximately 3,000 shares in a distribution of the Common Stock B of the defendant company under a stock subscription plan, the legality of which is not admitted and which is the subject of an independent litigation, whereby said defendant acquires said stock at $25 a share when at the time of acquisition it was selling in the stock market

in substantial amounts in excess of $112 a share, and has since sold at over $130 a share.

9. The plaintiff further avers that in addition to his fixed salary and other benefits hereinbefore referred to, the defendant Taylor on information and belief received by the way of profit sharing for the year 1929, 1½ percentum of all the net profits of said company in excess of $11,369,000 per annum, amounting to approximately $300,000, and 1½ percentum of said profits for the year 1930, amounting to approximately $400,000.

10. Plaintiff alleges said profit distribution was paid to the defendant Taylor pursuant to a by-law claimed to have been adopted by the shareholders at a stockholders' meeting held in Jersey City, N. J., March 13, 1912. A copy of said by-law marked Exhibit A, and of the notice sent out to the stockholders of the meeting at which said by-law was to be acted upon, marked Exhibit B, are annexed hereto and made a part of this complaint.

[fol. 187] 11. The plaintiff alleges that the said profit participation, as well as the by-law under which it was made, was illegal, ultra vires and void for the following reasons: (1) because by the charter of the defendant, The American Tobacco Company, hereto annexed and made a part hereof as Exhibit C, the directors were empowered to apply any surplus or net profits or earnings over and above the capital stock paid in from time to time only to the acquisition of property, or to the payment of dividends, and were not by any of the terms of said charter authorized to divert to any officer of the company any portion of such profits, surplus or earnings by way of profit participation; (2) because under the General Corporation Laws of New Jersey profit participation by officers or employees of any New Jersey corporation was not legal prior to the passage of Chapter 175 of the Public Laws of 1920, which by Subsection b of Section 1 for the first time provided for a participation by all or any of the employees of a New Jersey corporation in the profits of the corporate enterprise; (3) because the charter of the defendant company expressly provided that the power to make and alter by-laws of said company was conferred on the directors thereof, and the stockholders had no power to adopt the said by-law; (4)

because the notice of the meeting at which said by-law is claimed to have been adopted by the shareholders (a) did not specify the officers to whom such profit participation was to be paid; (b) did not specify that the profit participation was to be paid to officers as salary for the year in addition to fixed salaries; and (c) did not state that the profit participation was to be continued beyond the year when adopted.

[fol. 188] 12. The plaintiff further alleges since the said by-law was adopted or attempted to be adopted by the stockholders, the stockholders have added to the capital of the company over $113,000,000, of which approximately $65,000,000 was contributed from surplus earnings of said company between 1912 and 1931, and $48,823,875 from a sale of 390,583 shares of Common Stock B as of October 1, 1929; that even if valid when adopted the measure of compensation fixed by said by-law is not equitable or fair; and if applied would result in a total salary compensation to defendant Taylor, exclusive of insurance and pension benefits, or of profits from the purchase of 3,000 shares of stock at $25 a share heretofore referred to, but including fixed salary, of approximately $325,000 for the year 1929 and $425,000 for the year 1930; and that such compensation is exorbitant, excessive and illegal.

13. In a letter addressed by plaintiff prior to the institution of this suit be made a written demand on the defendant, The American Tobacco Company, to institute action against the defendant Taylor, among other officers of said company, to require him and them to account to the company for any excess of salaries or other profit participation paid him over and beyond such amount as the court might find to be reasonable for the years herein included, a copy of which letter is annexed hereto as Exhibit D; and that thereafter the said company by a letter addressed to plaintiff, a copy of which is annexed hereto as Exhibit E, declined to bring such suit.

[fol. 189] 14. The plaintiff further avers that the various payments made to the individual defendant herein were never disclosed to the stockholders of the said company by any official or other communication prior to February, 1931, when the plaintiff as a stockholder made an application to

the Supreme Court to examine the books of the said company with respect to salaries and other benefits or payments made by said company to its officers, directors and employees, and that prior to said date he had no knowledge thereof. He further says that prior to January 30, 1931, when it was announced in the newspapers that the company had sold to its employees 56,712 shares of Common Stock B at $25 a share, he had no knowledge of that fact; and did not learn until a pamphlet was distributed to stockholders by the President, George W. Hill, on or about March 14, 1931; to what extent the said individual defendant had profited by a sale of the stocks sold at $25 a share on January 30th of this year.

15. Plaintiff avers (1) that the profit participation paid to the defendant Taylor under the aforesaid by-law is illegal and void and a waste of corporate assets; (2) that if not illegal, because of the original invalidity of said by-law, that such profit sharing when added to his fixed salary for the years 1929 and 1930 renders his total compensation exorbitant, excessive, and to the extent which it exceeds a reasonable and fair salary for the services performed by said Taylor, is a waste of corporate assets to the detriment of this plaintiff and all other stockholders of defendant company; that unless enjoined the defendant company for [fol. 190] the current year and all future years will continue to pay to said Taylor compensation based upon a fixed salary and 1½% of all the profits of the company in excess of $12,369,000 per annum as provided by the terms of said by-law, to the irreparable injury of this plaintiff and all other stockholders of defendant company.

The plaintiff therefore prays:

(1) That the defendant Taylor be required to account for all monies paid to him in addition to his fixed salary by way of profit participation under the ultra vires and illegal by-law purported to have been adopted March 13, 1912, and that he be required to refund and repay to the company any and all such payments received by him from the years 1929 to the date of judgment herein, together with interest thereon from the date when accrued until paid;

(2) That if any effect be given to such by-law, then that the Court fix and determine the fair and reasonable com-

pensation of the defendant Taylor for each of the years aforesaid, and that he be compelled to account for and pay over to the said, The American Tobacco Company, the excess of such monies, profits or benefits actually received by him over such sum as the Court may fix as his reasonable compensation as an officer of the said company for each of said years, together with interest thereon;

(3) That the said The American Tobacco Company be enjoined from hereafter paying to the defendant Taylor [fol. 191] any further share of profits as provided for by the terms of the aforesaid illegal by-law; or any sum or consideration whether in the form of cash or stock below its market value, over and beyond the sums that may be fixed by the Court as reasonable compensation with respect to the defendant Taylor;

(5) And that the Court accord this plaintiff such other and further relief as he, and all other stockholders of said company, may be entitled to.

Respectfully submitted.

Richard Reid Rogers, Plaintiff, in sua Persona.

Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.

[fols. 192-194] Exhibit A to complaint in Rogers v. Taylor omitted; printed side page 23 ante.

[fol. 195] Exhibit B to complaint in Rogers v. Taylor omitted; printed side page 26 ante.

Exhibit C to complaint in Rogers v. Taylor same as Exhibit C to amended complaint, E. 59-115, pages 27 to 59, supra.

[fol. 196] Exhibit D omitted; printed side page 60 ante.

[fols. 197-201] Exhibit E to complaint in Rogers v. Taylor omitted; printed side page 61 ante.

[fol. 202] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR FURTHER PARTICULARS—NOV. 6, 1931

A motion having been made by defendants by an order to show cause dated June 2, 1931, and signed by Hon. William Bondy, United States District Judge, for an order requiring plaintiff to amend his bill of complaint by

(1) setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's complaint, or

(2) striking out certain allegations of the complaint;

And after hearing William M. Parke, Esq., of counsel for defendants, in support of the motion, and Richard Reid [fol. 203] Rogers, sua persona, for plaintiff, in opposition thereto;

Now, on motion of Chadbourne, Stanchfield & Levy, attorneys for defendants,

It is ordered that defendants' motion to compel plaintiff to amend his bill of complaint by setting out a further and better statement of the nature of plaintiff's claim be and the same hereby is granted as follows:

(1) that the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 8 of the bill of complaint, by setting forth the stock subscription plan;

(2) that the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 14 of the bill of complaint, by setting out a copy of the pamphlet distributed to the stockholders by the President, George W. Hill, on or about March 14, 1931.

It is further ordered that the alternative motion to strike out certain paragraphs of the complaint be and the same hereby is denied.

Woolsey, United States District Judge.

Plaintiff consents to the form of the order; but excepts to the order itself in so far as it grants further and better particulars.

Rich'd Reid Rogers.

[fol. 204] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FURTHER PARTICULARS

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, as follows:

1. The further particulars directed to be furnished in this action by the service of an amended complaint shall be furnished, in lieu of the service of an amended complaint, in the form of a verified bill of particulars, but such bill of particulars shall be deemed for the purposes of any motion that may be made by any party to this action as if incorporated and set forth at length in the complaint.

2. Such information shall be furnished in the form of a verified bill of particulars within ten (10) days after service of a copy of an order granting the undersigned defendants' motion for further particulars.

3. The undersigned defendants' time to answer, move, or otherwise plead with reference to the amended complaint [fol. 205] shall be extended to and including twenty (20) days after service of the verified bill of particulars.

Dated New York, November 6, 1931.

Rich'd Reid Rogers, Plaintiff, sua Persona. Chadbourne, Stanchfield & Levy, Attorneys for Defendants Thomas R. Taylor and The American Tobacco Company.

So ordered.

Woolsey, United States District Judge.

November 6, 1931.

[fol. 206] IN UNITED STATES DISTRICT COURT

E-60-94

[Title omitted]

BILL OF PARTICULARS

Pursuant to order of Court entered herein November 7, 1931, plaintiff herewith furnishes further and better particulars of all matters covered by said order.

1. With reference to the employees' stock subscription plan referred to in paragraph 8 of the complaint and covered by paragraph (1) of the order, plaintiff refers to the plan adopted by resolution of the stockholders July 28, 1930, a copy of which is annexed hereto and marked "Exhibit A"; to the agreement between the defendant The American Tobacco Company and Guaranty Trust Company of New York and Junius Parker dated January 30, 1931, together with the subscription agreement therein referred to, which was signed by various officers and employees among whom was the defendant, Thomas R. Taylor, who signed in the amount of 660 shares of common stock B, a copy of which agreement, with the subscription agreement therein referred to, appears on pages 16 to 28, inclusive, of the pamphlet issued by George W. Hill annexed hereto and hereinafter referred to as "Exhibit B"; and to the further fact that in carrying out said plan the Guaranty Trust Company of New York on February 10, 1931, paid the de-[fol. 207] fendant The American Tobacco Company $1,417,-800 for 56,712 shares of said common stock B out of which the allotment to defendant Taylor and others referred to above was made.

2. With reference to the pamphlet distributed to stockholders by George W. Hill on or about March 14, 1931, referred to in paragraph 14 of the complaint and covered by paragraph (2) of the order, plaintiff annexes hereto a copy of said pamphlet and makes the same a part hereof, marked "Exhibit B."

Dated New York, N. Y., November 10, 1931.

Richard Reid Rogers, Plaintiff in sua Persona. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.

[fol. 208] EXHIBIT A

Same as Exhibit A to Bill of Particulars in Rogers v. Hill, E. 59-115, pages 121-123, supra.

Exhibit B

Same as Exhibit B attached to Bill of Particulars in Rogers v. Hill action, E. 59-115, page 124, supra.

[fol. 209] In United States District Court

E-60-94

[Titles omitted]

Consolidated Cause

Affidavit of James B. Harvie

State of New York,
County of New York,
Southern District of New York, ss:

James B. Harvie, being duly sworn, deposes and says:

Under Article XII o the By-laws of The American Tobacco Company, the Treasurer is called upon to ascertain, as soon as practicable after the end of each year, the net profits of the Company as defined in said Article, and to pay to the persons entitled thereto under said Article, the amounts of additional compensation due to said persons under the terms thereof.

[fol. 210] As Treasurer, it has been my practice for many years, as it has also been that of my predecessors in such office, to make a conservative calculation immediately at the conclusion of the year, and thereupon, based on such calculation, to pay to each person entitled to additional compensation under Article XII, in partial payment and on account of such additional compensation, an amount calculated by me to be a conservative payment; thereafter paying to such persons the balance found due them after our books have been finally closed.

Accordingly, after the end of the calendar year 1931, to wit, on January 2, 1932, there were paid by me the following amounts to the following persons, as partial payments of the amounts that I estimated were due them for the year 1931 under Article XII of our By-laws:

George W. Hill	$850,000
Charles F. Neiley	418,250
Vincent Riggio	418,250
Executors of the Estate of Charles A. Penn, deceased	350,000
Arthur C. Mower	250,000

James B. Harvie.

Sworn to before me this 13th day of January, 1932. W. O. Taylor, Notary Public, Nassau Co. Certificate filed New York Co. No. 305. N. Y. Register Certificate No. 3T217. My commission expires March 30, 1933. (Seal.)

[fol. 211] In United States District Court, Southern District of New York

In Equity. No. 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, Defendants

Consolidated Cause

Opinion

Plaintiff moves for an order striking out the 1st, 2nd, 3rd, 4th and 5th separate defenses; for a decree adjudging By-Law XII invalid, requiring three of the company's officers to account for payments and enjoining the company from making further payments thereunder; or, in the alternative, for an injunction pendente lite against further payments to any president or vice-president of the company under the by-law.

Upon my consideration of the case to date, I am persuaded that a cause of action is stated in the bill, that this

court is bound to exercise jurisdiction and that in Rogers v. Guaranty Trust Co., et al., E 59/307, Judge Patterson has not held to the contrary. I am persuaded also that, whatever the outcome of more mature consideration may be, the contentions of the plaintiff on the first and second branches of his motion have enough merit to require that the status quo be maintained until they are deliberately passed on.

[fol. 212] My present impressions are that, in so far as pertinent to the determination of this suit, the by-law is invalid and the defenses are insufficient. These impressions, however, are tentative. Because of inadequate opportunity up to this time for investigation and reflection, I am not yet prepared to announce them as final views. The briefs are elaborate and numerous authorities are cited. The exigencies of performing other court duties would unavoidably result in much additional delay before it would be possible for me to complete the study which would be essential for the formulation of a reasoned statement upon all the interesting and important—as well as in some aspects novel—issues raised.

It seems to me that, as matter of good administration, it is desirable, if it be practicable, to procure an early authoritative ruling on the by-law and on the defenses. I have concluded, therefore, presently to pass on a single matter; also to do this in a form which I think will put the case in shape for immediate review by the Circuit Court of Appeals and, if that court should deem wise, for review on a question or on questions of crucial consequence, the inquiry as to the by-law being of such nature that obviously, as I conceive, the controversy over it should be settled as speedily as orderly procedure permits.

I am now ready to award the plaintiff, and I feel that he is entitled to, an injunction pendente lite against future payments to the individual defendants (served or appearing and claiming them) under the by-law either for 1931 or for any subsequent year. If an appeal from an order to that effect were taken promptly and prosecuted expedi-

[fol. 213] tiously, pursuant to Section 129 of the Judicial Code (28 U. S. C. A., sec. 227), my disposition would be to postpone the balance of the motion until after a decision by the appellate court. On the other hand, I reserve the right, in the light of developments hereafter, to proceed

with the other phases of the motion. Moreover, I shall proceed with them if all parties desire me to do so or if the defendants elect not to appeal.

In the event of an appeal and its being heard prior to the Court of Appeals adjourning for the summer, it seems likely that a ruling which would guide this court could be obtained previous to any question arising with respect to a distribution under the by-law out of the company's 1932 profits; and the proof shows that for 1931 the major part of a distribution, in compliance with the terms of the by-law, has already been made.

I regard the course I am adopting as in the interest of both sides and not unfair to either side. There is no suggestion here of insolvency. In the absence of some other ground against suspension, on the terms stated, of action by this court on his motion, I see no reason for complaint by the plaintiff. If, in its discretion, the Court of Appeals should by autumn rule on some controlling question (which I assume necessarily would eventually have to be ruled on by that court any way), then this court could much better proceed, in conformity with that decision, to a final disposition.

Settle order for temporary injunction, in accord with the foregoing, on two days' notice; amount of bond to be fixed, unless agreed on.

Dated March 17, 1932.

Francis G. Caffey, United States District Judge.

[fol. 214] In United States District Court

In Equity. No. 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, Defendants

Consolidated Cause

Order Appealed From—March 23, 1932

This cause having come on to be heard on a motion by the plaintiff (1) to strike out the First, Second, Third,

Fourth and Fifth Separate Defenses of the answer of defendants The American Tobacco Company, George W. Hill, C. F. Neiley, V. Riggio and T. R. Taylor; (2) for a decree upon the pleadings and bill of particulars declaring by-law XII of 1912 invalid, and requiring the defendants Hill, Neiley and Riggio to account for all payments severally received by each of them thereunder, and enjoining the defendant The American Tobacco Company from making any [fol. 215] further payments thereunder; and (3) in the alternative to the relief mentioned in clause (2) for an injunction pendente lite, enjoining the defendant The American Tobacco Company from making any further payments to any president or vice-president under said by-law;

Now, upon the notice of motion, the verified amended complaint of the plaintiff, the verified bill of particulars furnished by plaintiff, the plaintiff's affidavit sworn to on the 7th day of January, 1932, the verified answer of the defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, and the affidavit of J. B. Harvie sworn to on January 13, 1932, with proof of service of all said papers; and the plaintiff having been heard pro se in behalf of said motion; and the aforesaid defendants by Messrs. Chadbourne, Stanchfield & Levy (Victor J. Dowling, Louis S. Levy, William M. Parke, George W. Whiteside, J. Arthur Leve, J. Edward Ashmead and Merritt Lane, of Counsel) having been heard in opposition thereto;

And it appearing to the Court that the complaint states a cause of action, and that it is bound to exercise jurisdiction of said cause; and the present impression of the Court being that the said by-law XII of 1912 is invalid and that the First, Second, Third, Fourth and Fifth Separate Defenses of the answer of defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company are insufficient; and it further appearing that the plaintiff is entitled to have the status quo maintained until the issues raised by the pleadings are decided; it is

[fol. 216] Ordered that, upon the giving or waiver of bond as hereinafter provided, an injunction pendente lite be and it is granted to the plaintiff enjoining The American Tobacco Company from making any further payments under

said by-law to any president or vice-president; and it is further

Ordered that the bond of the plaintiff, until otherwise ordered by this Court, be and the same hereby is fixed at $1,000.00; that the condition thereof be as prescribed by section 382 of title 28 of the United States Code; that unless the solicitors of the defendants by stipulation filed in this case waive the giving of a bond or consent to reduction of the amount thereof, the injunction hereby granted shall become effective only upon a bond in conformity with this order being filed in this cause within ten days from the date hereof and being approved by the Court.

Francis G. Caffey.

[fol. 217] IN UNITED STATES DISTRICT COURT

E-60-94

[Title omitted]

Consolidated Cause

PETITION FOR APPEAL

The above named defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, conceiving themselves aggrieved by the order and decree made on the 23rd day of March, 1932, and entered on the 24th day of March, 1932, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said order and decree [fol. 218] were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., March 31, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and the American Tobacco Company. Office & Post Office address: No. 25 Broadway, Borough of Manhattan, New York, N. Y.

Ordered that the appeal be and it is hereby allowed upon appellants filing a bond as required by law for the sum of Two hundred and fifty Dollars ($250).

Wm. Bondy, U. S. D. J.

[fol. 219] IN UNITED STATES DISTRICT COURT

In Equity. No. 60-94

[Title omitted]

Consolidated Cause

ASSIGNMENT OF ERRORS

The defendants, Hill, Neiley, Riggio, Taylor, and The American Tobacco Company, in the above entitled cause, in connection with their petition for the allowance of an appeal herein, respectfully make the following assignment of errors, which occurred in the order and decree from which said appeal is taken and in the opinion of the District Court rendered prior to the entry of said order and decree, to wit:

(1) The Court erred in granting plaintiff's motion for an injunction pendente lite.

(2) The Court erred in holding that the complainant states a cause of action.

[fol. 220] (3) The Court erred in holding that it is bound to exercise jurisdiction of said cause.

(4) The Court erred in holding the By-Law invalid.

(5) The Court erred in not dismissing the complaint under the First and Third Separate Defenses.

(6) The Court erred in holding that the First, Second, Third, Fourth, and Fifth Separate Defenses of defendants Hill, Neiley, Riggio, Taylor, and The American Tobacco Company were insufficient.

(7) The Court erred in holding that the plaintiff is entitled to have the status quo maintained until the issues raised by the pleadings are decided.

Wherefore appellants pray that the order and decree of the District Court may be reversed, and for such other and further relief as justice may require.

Dated New York, N. Y., March 31, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and the American Tobacco Company. Office & Post Office address: 25 Broadway, Borough of Manhattan, New York City.

[fol. 221] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the United States District Court for the Southern District of New York in the above entitled action, and that the same may be settled and ordered on file herein.

Dated New York, N. Y., April 7th, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and the American Tobacco Company. Richard Reid Rogers, Plaintiff, pro se.

In United States District Court

Order Settling Case

Pursuant to the foregoing stipulation, the foregoing transcript is hereby settled as a true and correct transcript of the record of said action in this Court, and as such it is ordered on file herein.

Dated New York, N. Y., April 7th, 1932.

Francis G. Caffey, United States District Judge.

[fol. 222] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 223] In United States District Court, Southern District of New York

E 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants

Richard Reid Rogers, Plaintiff,

against

Thomas R. Taylor and The American Tobacco Company, Defendants

Consolidated Cause

Statement

This is the second appeal to the Circuit Court of Appeals for the Second Circuit in the above-entitled consolidated cause. The former appeal was taken from an order of the District Court for the Southern District of New York entered March 24, 1932, upon a motion made by plaintiff-appellant: (1) for an order striking out the separate defenses in the answer; (2) for judgment upon the pleadings for certain specified relief; and (3) in the alternative for an injunction pendente lite. The District Court, not deciding the other branches of the motion, made an order granting an injunction pendente lite on condition of the filing of a bond in the sum of $1,000 by the plaintiff, which bond was filed and approved, and the injunction was issued and served.

[fol. 224] Upon appeal by the defendants from said order, the Circuit Court of Appeals, after rendition of a majority opinion and a dissenting opinion in which the merits of the cause were discussed, directed a reversal of the order granting the injunction pendente lite, and sent its mandate to the District Court to that effect.

The District Court thereupon, upon the coming down of the mandate and after reading the majority opinion of the

Circuit Court of Appeals, and concluding therefrom that the latter Court had decided the merits of the cause unfavorably to the plaintiff, made its decree, which was entered July 8, 1932, dismissing the complaints upon the merits; from which decree this appeal was taken on October 5, 1932.

For an account of the proceedings prior to the former appeal, reference is made to the statement at the beginning of the record on that appeal, incorporated in the record on the present appeal, since the filing of which there has been no change in the parties hereto or their attorneys.

The papers contained in the record on the former appeal having already been printed and being already on file with the Clerk of the Circuit Court of Appeals, the reprinting thereof has been dispensed with by order of that court entered November 2, 1932, which order provides that said copies already on file may be used by that court as a part of the record on the present appeal.

[fol. 225] In United States Circuit Court of Appeals for the Second Circuit

Before Manton, Swan, and Chase, Circuit Judges

Richard Reid Rogers, Plaintiff-Appellee,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants-Appellants

Richard Reid Rogers, Plaintiff-Appellee,

against

Thomas R. Taylor and The American Tobacco Company, Defendants-Appellants

Appeal from the District Court for the Southern District of New York. Suits by plaintiff against the defendants to have declared invalid a by-law of the American Tobacco Company, a defendant, and for a decree directing that all compensation paid under the provisions of the by-law be

repaid to the corporation and that future distribution thereunder be enjoined. The suits have been consolidated. An order was entered granting an injunction pendente lite, enjoining the company from making any further payments pursuant to the by-law. Defendants appeal. Order reversed.

[fol. 226] Chadbourne, Stanchfield & Levy, Esqs., Attorneys for Appellants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company (Nathan L. Miller, Esq., Victor J. Dowling, Esq., George W. Whiteside, Esq., J. Arthur Leve, Esq., of Counsel).

Richard Reid Rogers, Esq., Plaintiff-Appellee, pro se.

OPINION

MANTON, Circuit Judge:

The appellee is the owner of 200 shares of common and 400 shares of Common B stock, and seeks a decree declaring Art. XII of the By-Laws of The American Tobacco Company invalid and ordering that all compensation paid thereunder to appellants be repaid to the corporation and future payments be perpetually enjoined. It is sought to have the court fix the amount of compensation to which the appellants, officers of the corporation, are justly entitled during their respective periods of service and that in the future the officers receive no additional contingent compensation. On motion by the appellee to strike out each of the five separate defenses interposed by the appellants, the court held that they were insufficient.

On March 13, 1912, the stockholders of The American Tobacco Company, appellant, adopted as a By-Law, Art. XII, which provided:

"As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an

[fol. 227] amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent of such amount, to the President; one-fifth of the remainder thereof, or 1½ per cent of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers."

By Sec. 5 of this By-Law, it was provided that the By-Law may be modified or repealed only by action of the stockholders of the Company and not by the directors. The By-Law was adopted by a large majority in interest of the Company's shares, 35 preferred shares voting against its adoption. Appellee became a stockholder in 1916. Appellant Hill became a director in 1921 and President on April 7, 1926; Mower, a director on April 6, 1921, and has since become a vice-president; Penn, a director on April 6, 1921, and since a vice-president; appellant Neiley, a director on April 6, 1921, and a vice-president May 1, 1929; appellant Riggio, a director on April 4, 1928, and a vice-president May 1, 1929.

Until the present suit was instituted, the legality of this By-Law was never questioned. The charges of illegality are: (a) that by the charter of the Company, the directors are empowered to apply surplus or net profits only to the acquisition of property or the payment of dividends, and they are not authorized to divert any portion of the profits to officers of the corporation by way of additional compensation; (b) that profit participation by the officers and employees of a New Jersey corporation was not legal prior to the passage of Chapter 175 of the Laws of 1920 (subsection B, Sec. 1); (c) that the power to make and alter by-laws was conferred upon the directors, and the stockholders had no power to adopt the by-law; (d) that the notice of the meeting at which the by-law was adopted did not specify the officers to whom the profit participation [fol. 228] was to be paid; that it did not specify that the profit participation was to be paid to the officers as salaries in addition to their fixed salaries, and did not state that the participation was to be continued beyond the year when adopted.

Among the defenses which were held below to be insufficient were:

(1) that the stockholders of the Company, including the appellee, ratified the payments made to the appellants in accordance with and under the authority of Art. XII;

(2) that the present suit is an attempt to interfere with the internal management of a corporation doing a nation-wide business, the affairs of which are dependent upon the statutes of New Jersey, and that By-Law XII was legally adopted and is valid;

(3) that the amount of compensation paid to the individual appellants was and is fair and reasonable for their services, that the Board of Directors had the right to fix the compensation of its agents and that the payments were made in accordance therewith, as well as under the authority of By-Law XII.

When the appellee purchased his stock he was presumed to know the provisions of the corporation's by-laws and he made his investment with that knowledge. Giesen v. London & Northwest American Mortgage Co., 102 Fed. 584 (C. C. A. 8); Kavanaugh v. Commonwealth Trust Co., 223 N. Y. 103; State v. Shaw, 103 Ohio State 660; Chicago, Springfield & St. L. Ry. Co. v. Martin, 249 Ill. App. 109. The charter of the corporation (Art. II) provides, among other things, that the directors shall have the power "to direct and determine the use and disposition of any surplus or net profits or earnings over and above the capital stock paid in." Directors have power to hire employees. Nothing in the by-laws of this corporation forbade employing [fol. 229] them upon a contingent basis. There is no rule of law of which we are aware that forbids directors from providing contingent or fixed compensation for the employees of a corporation, providing the agreements are fair and free from fraud. But the claim is advanced by the appellee that the directors were empowered to employ surplus, net profits or earnings only in the acquisition of property or in payment of dividends, and that the additional salary allotments here are in direct conflict with the charter provisions. Compensation to officers of a corporation is an operating expense of the company, whether at a fixed salary or based upon a percentage of the profits, and until such expenditures are met there are no net profits of the corporation. It is the sum beyond this which constitutes

the surplus, net profits or earnings referred to in this corporation's charter. Profit participation creates an item of expense in the operation of the business and this has been recognized by judicial decisions in New Jersey, the state of the corporation's creation. Bennett v. Millville Improvement Co., 67 N. J. L. 320; Booth v. Beattie, 95 N. J. Eq. 776; Berendt v. Bethlehem Steel Co., 108 N. J. Eq. 148.

Under the General Corporation Act of New Jersey (Chap. 175, L. 1920), stockholders have adequate power to pay officers an additional and contingent salary out of net profits. Sec. 1, paragraph V, provides that every corporation shall have power to appoint such officers and agents as the business of the corporation shall require and to allow them suitable compensation. By-Law XII is in strict conformity with the express powers delegated to the corporation by the General Corporation Act of New Jersey. Bennett v. Millville Improvement Co., supra. The right to pay compensation by way of a percentage of the net profits is recognized in New Jersey. Smith v. Bedell, 84 N. J. Eq. 268, affirmed 84 N. J. Eq. 509; Booth v. Beattie, supra. Corporate management may pay a participation [fol. 230] of the net profits to officers as additional salary either as a bonus or in the form of shares of stock. Harker v. Ralston, 45 Fed. (2) 929 (C. C. A. 7); Church v. Harnit, 35 Fed. (2) 499 (C. C. A. 6); Ransome v. Moody, 282 Fed. 29 (C. C. A. 2); Greene v. Wilbrahan, 190 Fed. 274; Young v. U. S. Mortg. & Trust Co., 214 N. Y. 279.

It is argued that the phrase "profit participation" was first mentioned in a New Jersey statute in Chap. 175 of the Laws of 1920, and this was the first permission for payment of contingent salaries. It is argued that prior thereto the payment of moneys out of alleged profits was illegal. Section 4 of the act provides:

"The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this State."

Profit participation by employees is not only within the express power of the corporation prior to the enactment of the 1920 statute, but was recognized by the courts of

New Jersey as an implied power of the corporation. Chapter 175 of the Laws of 1920 provided for the particular manner in which such plans therein specified could be adopted. That act authorized the adoption of profit participation; it permitted New Jersey corporations to adopt a plan for the purpose of "furnishing to its employes wholly or in part at the expense of such corporation of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing, social services, recreation or other similar aids for their general welfare." The New Jersey courts, as early as 1899, held the adoption of such plans to be within the implied or express powers of a foreign corporation. Beck v. Pennsylvania R. R. Co., 63 N. J. L. 232.

[fol. 231] Section II of the General Corporation Law of New Jersey (Revision of 1896, Chap. 185) provides that the power to make and alter by-laws shall be in the stockholders, but that any corporation may, in its certificate of incorporation, confer that power upon the directors, and the by-laws made by the directors under such power may be altered or repealed by the stockholders. The charter of this corporation provided that the power to make and alter the by-laws of the corporation shall be conferred upon the directors. This delegation of authority to directors, within the by-laws, is legal. To make or amend by-laws is legal. In re Griffing Iron Co., 63 N. J. L. 168, affirmed 63 N. J. L. 357. The regulation of official duties and salaries is a proper subject for by-laws as within the power of the stockholders or the power of the directors where they are authorized to act. Lilliard v. Oil, Paint & Drug Co., 7 N. J. Eq. 197.

But it is contended that the notice of the meeting at which Art. XII was adopted by the corporation's shareholders was insufficient. The meeting was held March 13, 1912, and it was pursuant to Sec. 17 of the General Corporation Act of New Jersey (Laws of 1896, Chap. 185, as amended by Laws of 1901, Chap. 119, Sec. 1), which permits every corporation to determine by its certificate of incorporation or by-laws the manner of calling and conducting all meetings. Special meetings to make fundamental changes in the corporation require notice of meet-

ings pursuant to the by-laws (Sec. 27, Laws of 1896, Chap. 185, as amended by Laws of 1908, Chap. 84, Sec. 1).

Art. II, Sec. 3 of the By-Laws, provides that due notice of each annual meeting of the stockholders be given by a written or printed notice, mailed at least 20 days prior to the meeting, to each stockholder entitled to vote appearing upon the books of the corporation. It is provided that a public notice of the time and place of holding such meeting be published not less than once a week for two consecutive weeks in a daily newspaper published in the City [fol. 232] of New York. Special meetings are called in like manner, and for these "the notice shall state the object of the special meeting, and no other business shall be transacted at such meeting." From this it is apparent that neither the by-laws of the corporation nor the statutes of New Jersey require a notice of any meeting to include a specification of the details of the business to be conducted. Under the by-laws the object must be stated only for a special meeting. The by-law here (Art. XII) was adopted at a regular annual meeting and the by-laws of the corporation provide that at such meeting "any business may be transacted without notice of the object of such meeting." There was ample notice given to the stockholders on the occasion of the adoption of this by-law. All shareholders were given a written notice stating the date, hour and place of the meeting. It was further said in the notice: "At this meeting there will be presented for consideration, and action upon, a proposed by-law providing for participation by certain officers of the Company in profits, if any, earned by the Company in excess of profits earned during the year 1910 on the brands of businesses now owned by the Company, not exceeding in the aggregate 10% of such excess." The appellee maintains that the by-law could not be passed upon at this meeting because the object set out in the notice was participation by certain officers of the corporation in its profits and therefore no object which dealt merely with salary increases could be passed. This complaint against the notice is frivolous. It sufficiently informed shareholders that a subject-matter to be considered was the payment to certain officers of a contingent salary. By any reasonable inquiry at the meeting, or prior thereto, one to whom this notice was insufficient might have gained further knowledge or surely would have been in a

position to vote his shares of stock intelligently. U. S. Steel Corp. v. Hodge, 64 N. J. Eq. 807.

Moreover, as we have pointed out, the present officers, who are enjoined by the order below, became such years [fol. 233] after the adoption of By-Law XII, providing additional salaries. When they accepted their offices and employment in the corporation, one of the promises of the corporation was their right to compensation for services, measured by additional profits above the sum specified in the by-law. It became part of the contract of employment. It was a promise which the corporation must keep until the by-law is repealed or changed. Metropolitan Rubber Co. v. Place, 147 Fed. 90 (C. C. A. 2); Zwolanek v. Baker Mfg. Co., 150 Wisc. 517.

There is no claim in the bill, nor can the argument be maintained, that there was any fraud or collusion in the passage of this by-law between appellants who have enjoyed the fruits of its enactment and the corporation. The by-law is neither ultra vires, fraudulent nor illegal, and since it is not, courts must refuse intervention because they are powerless to grant it. Here the matter of salaries, like that of other corporation affairs, must be disposed of by the majority of stockholders and in the manner that their interests may dictate, and the action of the majority is binding upon all, whether approved or disapproved by the minority. Individual minority shareholders are not permitted to question the acts of directors, if they are within the powers of the corporation and in furtherance of its purposes, and if they are not unlawful or against good morals and are done in good faith and in the exercise of honest judgment. U. S. Steel Corp. v. Hodge, supra. By-Law XII was properly passed and became a valid governing act of the corporation.

This grew to be a very large corporation. On the 1st of January, 1931, its corporate structure was as follows: preferred stock, par value $100 per share, outstanding $52,699,700; common stock, par value $25, authorized fifty million dollars, outstanding $40,242,400, common stock B, par value $25, authorized One hundred million dollars, outstanding $76,933,950. Its current liabilities were approxi- [fol. 234] mately Five million dollars; current quick assets were approximately One hundred and forty-seven million dollars. It was world-wide in its operations. In 1930, its

net earnings, after deducting all charges and expenses for management and taxes amounted to $43,345,370; it paid dividends on common stock in 1930 of $29,294,000; an extra dividend of $1 was declared in the first quarter of 1931; total dividends paid on its common stock for that year exceeded $28,300,000 and it paid $3,161,982 dividends on its preferred stock. In 1930 it paid to the government $150,000,000 in taxes. During the corporate management of the individual appellants, profits increased some $20,000,000 a year up to 1930. There was divided in 1931 approximately $2,500,000 pursuant to the terms of By-law XII amongst the president and five vice-presidents. The corporation has had a very unusual success due to the skillful management of these able men. With this knowledge at hand, the majority of the stockholders might well have approved the policy year after year of a contingent compensation to the active managers of the corporation's business affairs. They were justified in the retention of by-law XII during this period of years because of the great success attained. That the president and five vice-presidents each received unusually large salaries as a result does not justify a court of equity in attempting to substitute its judgment for the judgment of the stockholders whose affair it is in the absence of any claim of fraud. In any case, we think that the by-law was lawfully passed and that it was valid, effective and controlling in the allotment of additional compensation to officers of the corporation.

Judgment reversed.

Swan, J., dissenting.

[fol. 235] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Before Manton, Swan, and Chase, Circuit Judges

Dissenting Opinion

Swan, Cir. J., dissenting:

In 1912 the stockholders of the appellant adopted a by-law which provided that 10 per cent of the annual "net profits" be distributed, 2½ per cent to the president and

1½ per cent to each of the five vice-presidents "in addition to the fixed salary of each of said officers." The by-law does not expressly say that the payments provided for are [fol. 236] by way of additional compensation to the officers, and the notice of the meeting at which the by-law was adopted referred to the proposed resolution as one for the distribution of profits. If it was really a distribution of profits rather than a method of compensation, the majority stockholders had no power to vote it. I shall assume, however, that the by-law was valid when passed. But it does not follow that it will remain valid for all time regardless of the amount payable under it. If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part, and the majority stockholders have no power to give away corporate property against the protest of the minority. See Endicott v. Marvel, 81 N. J. Eq. 378, 384; Collins v. Hite, 153 S. E. 240 (W. Va.).

The present suits attack payments made under the by-law since 1921, totalling more than $10,000,000, and seek an injunction against further payments. The bonuses paid to the president increased from $90,000 in 1921 to $840,000 in 1930. In the latter year his additional emoluments included a fixed salary of $168,000 and "special cash credits" of $270,000. Bonuses paid four of the vice-presidents for that year totalled $1,830,000, in addition to which they received fixed salaries and special credits totalling $700,000. Apparently these sums were thought insufficient, for in that same year the board of directors initiated a plan which resulted in the distribution to these five officers and directors of almost 30,000 shares of stock at $87 per share less than its then market value. The court below thought that a sufficient showing of invalidity had been made to justify a temporary injunction against future payments under the by-law. In my opinion a bonus of $840,000 to an officer receiving a fixed salary of $168,000, is presumptively so much beyond fair compensation for services as to make a prima facie showing that the corporation is giving away money, and a by-law which sanctions this is prima facie unreasonable, and hence unlawful. This is all we need to hold to support the injunction pendente lite.

[fol. 237] The determination of fair compensation for services is primarily for the directors. Courts hesitate to

overrule the discretion of directors fairly exercised. Here the directors have exercised no discretion; they rely upon a by-law to relieve them of that duty, and the by-law, as it now operates, results in so large a payment that the trial court thought it probably invalid as applied to future earnings. Under such circumstances the courts do not and should not refuse to consider whether a bonus plan is fair or oppressive. See Sotter v. Coatesville Boiler Works, 101 Atl. 744 (Pa.); Collins v. Hite, 153 S. E. 240 (W. Va.); Wight v. Heublein, 238 F. 321 (C. C. A. 4); Nichols v. Olympia Veneer Co., 246 Pac. 941 (Wash.); McKey v. Swenson, 205 N. W. 583, 586 (Mich.); Lowman v. Harvey R. Pierce Co., 120 Atl. 404 (Pa.); Scott v. P. Lorillard Co., 154 Atl. 515 (N. J.), affirmed 157 Atl. 388; Berendt v. Bethlehem Steel Corp., 154 Atl. 321 (N. J. Ch.); Stratis v. Andreson, 150 N. E. 832 (Mass.); Ransome Concrete Machinery Co. v. Moody, 282 F. 29, 32 (C. C. A. 2); Church v. Harnit, 35 F. (2nd) 499, 502 (C. C. A. 6); Booth v. Beattie, 118 Atl. 257 (N. J.), affirmed 123 Atl. 925; Putnam v. Juvenile Shoe Corp., 269 S. W. 593 (Mo.). I think the injunction pendente lite should be affirmed.

[fol. 238] In United States Circuit Court of Appeals for the Second Circuit

Richard Reid Rogers, Plaintiff-Appellee,

against

George W. Hill et al., Defendants-Appellants,

(and another case)

Order for Mandate—June 20, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby

Ordered, adjudged, and decreed that the order of the said District Court be, and it hereby is, reversed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

William Parkin, Clerk.

[fol. 239] MANDATE

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Whereas lately in the District Court of the United States for the Southern District of New York, before you or some of you, in a cause between Richard Reid Rogers and George W. Hill, et al., an order was entered in the office of the Clerk of said Court in the words and figures following, to wit:

This cause having come on to be heard on a motion by the plaintiff (1) to strike out the First, Second, Third, Fourth and Fifth Separate Defenses of the answer of defendants The American Tobacco Company, George W. Hill, C. F. Neiley, V. Riggio and T. R. Taylor; (2) for a decree upon the pleadings and bill of particulars declaring by-law XII of 1912 invalid, and requiring the defendants Hill, Neiley and Riggio to account for all payments severally received by each of them thereunder, and enjoining the defendant The American Tobacco Company from making any further payments thereunder; and (3) in the alternative to the relief mentioned in clause (2) for an injunction pendente lite, enjoining the defendant The American Tobacco Company from making any further payments to any president or vice-president under said by-law;

Now, upon the notice of motion, the verified amended complaint of the plaintiff, the verified bill of particulars furnished by plaintiff, the plaintiff's affidavit sworn to on the 7th day of January, 1932, the verified answer of the defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, and the affidavit of J. B. Harvie, sworn to on January 13, 1932, with proof of service of all said

papers; and the plaintiff having been heard pro se in behalf [fol. 240] of said motion; and the aforesaid defendants by Messrs. Chadbourne, Stanchfield & Levy (Victor J. Dowling, Louis S. Levy, William M. Parke, George W. Whiteside, J. Arthur Leve, J. Edward Ashmead and Merritt Lane, of Counsel) having been heard in opposition thereto;

And it appearing to the Court that the complaint states a cause of action, and that it is bound to exercise jurisdiction of said cause; and the present impression of the Court being that the said by-law XII of 1912 is invalid and that the First, Second, Third, Fourth and Fifth Separate Defenses of the answer of defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company are insufficient; and it further appearing that the plaintiff is entitled to have the status quo maintained until the issues raised by the pleadings are decided; it is

Ordered that, upon the giving or waiver of bond as hereinafter provided, an injunction pendente lite be and it is granted to the plaintiff enjoining The American Tobacco Company from making any further payments under said by-law to any president or vice-president; and it is further

Ordered that the bond of the plaintiff, until otherwise ordered by this Court, be and the same hereby is fixed at $1,000.00; that the condition thereof be as prescribed by section 382 of title 28 of the United States Code; that unless the solicitors of the defendants by stipulation filed in this case waive the giving of a bond or consent to reduction of the amount thereof, the injunction hereby granted shall become effective only upon a bond in conformity with this order being filed in this cause within ten days from the date hereof and being approved by the Court.

Francis G. Caffey.

[fol. 241] As by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord One thousand nine hundred and thirty-one, the said cause came on to be heard before the said United

Circuit Court of Appeals for the Second Circuit on the said transcript of record, and was argued by counsel.

On consideration whereof, it is hereby

Ordered, adjudged and decreed:

That the order of said District Court be and it hereby is reversed with costs, taxed at the sum of $345.10.

You therefore are hereby commanded that such further proceedings be had in said cause in accordance with the decision of this Court as according to the right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Hon. Charles Evans Hughes, Chief Justice of the United States, the twenty-ninth day of June in the year of our Lord Nineteen hundred and thirty-two.

Costs of Appellants:

Clerk	$24.70
Printing record	300.40
Attorney	20.00
	$345.10

William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[fol. 242] In United States District Court

E 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants

Richard Reid Rogers, Plaintiff,

against

Thomas R. Taylor and The American Tobacco Company, Defendants

Consolidated Cause

Decree Dismissing Complaint—July 8, 1932

A decree in the above-entitled consolidated cause having been entered in this Court on the 23rd day of March, 1932,

granting to the plaintiff herein an injunction pendente lite upon the giving by the plaintiff of a bond in the sum of $1,000, the condition thereof to be as prescribed by Section 382, Title 28, of the United States Code, enjoining The American Tobacco Company from making any further payments under By-Law XII of 1912 of the said Company to any President or Vice-President thereof, and the plain-[fol. 243] tiff having given said bond, and defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company having taken an appeal from the said decree to the United States Circuit Court of Appeals for the Second Circuit, from which a mandate has duly issued to this Court reversing said decree of this Court, and it appearing from the decision of the said Circuit Court of Appeals that the said cause was adjudicated by said Circuit Court of Appeals in favor of the said defendants on the merits, it is hereby

Ordered that the said injunction pendente lite be and it is hereby vacated; and it is further

Ordered that the defendants George W. Hill, C. F. Neiley, Riggio, Thomas R. Taylor and The American Tobacco Company have judgment against the plaintiff, Richard Reid Rogers, that each of the bills of complaint herein be and the same is hereby dismissed upon the merits, at the cost of the plaintiff, which costs, including the costs of the Circuit Court of Appeals specified in said mandate, will be fixed by the Clerk against the said plaintiff, and for which, if not paid in ten days, execution will issue upon the application of any party in interest; and it is further

Ordered that the said defendants recover of the said plaintiff and the sureties on the injunction bond such damages not exceeding one thousand dollars in the aggregate as the several said defendants have suffered by reason of the issuing of said injunction pendente lite, and that this cause be referred to Benjamin V. Cohen, who is hereby appointed Special Master for that purpose, to ascertain and report to this Court what damages, if any, the several said defendants have suffered by reason of the injunction aforesaid.

J. W. Mack, U. S. C. J.

Entered July 8, 1932.

[fol. 244] In United States District Court

Equity 60-94

[Title omitted]

Consolidated Cause

Petition for Appeal and Order Allowing Same

The plaintiff above-named, conceiving himself aggrieved by the order and decree made and entered on the 8th day of July, 1932, in the above-entitled cause, dismissing the bills of complaint herein and granting certain other relief to the defendants, hereby appeals from said order and decree, and from each and every part as well as the whole thereof, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specifically set forth in the assignment of errors which is filed herewith; and he prays that the said appeal may be allowed, and after due hearing for such further relief as justice may require.

Dated New York ,N. Y., October 5th, 1932.

Richard Reid Rogers, Plaintiff, pro se. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

[fol. 245] It is ordered that the above-mentioned appeal be and it is hereby allowed on condition that the plaintiff file a bond as required by law in the sum of Two hundred and fifty dollars ($250) as security for costs on said appeal.

Dated New York, N. Y., Oct. 5, 1932.

Woolsey, U. S. D. J.

In United States District Court

Equity 60-94

[Title omitted]

Consolidated Cause

Assignment of Errors—Present Appeal

The plaintiff in the above-entitled cause in connection with his petition for the allowance of an appeal herein re-

spectfully makes the following assignment of errors which (in addition to other errors not hereby assigned) occurred [fol. 246] in the order and decree from which said appeal is taken, to-wit

1. The Court erred in dismissing the bills of complaint upon the merits.

2. The Court erred in failing to render judgment for the plaintiff for relief prayed for in the amended complaint.

3. The Court erred in dismissing the bills of complaint solely upon the mandate and decision of the Circuit Court of Appeals.

Wherefore the plaintiff prays that the order and decree of the District Court may be reversed, and for such other and further relief as justice may require.

Richard Reid Rogers, Plaintiff, pro se. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

[fol. 247] In United States District Court

E 60-94

[Title omitted]

Consolidated Cause

Order as to Record—Nov. 1, 1932

The plaintiff having appealed to the Circuit Court of Appeals for the Second Circuit from the decree of the District Court for the Southern District of New York entered herein on the 8th day of July, 1932, and said plaintiff, appearing pro se, having duly served and filed his præcipe showing the papers proposed by him to be incorporated in the record on said appeal, and the defendants Hill, Neiley, [fol. 248] Riggio, Taylor and The American Tobacco Company, by their attorneys, Chadbourne, Stanchfield & Levy, having duly served and filed their counter præcipe for said record, and a difference having arisen between

the parties as to the contents of said record, and the plaintiff having moved this Court for an order settling the contents of said record and extending the time for the filing thereof; and said motion having come on to be heard, upon the notice of motion and the affidavit of Richard Reid Rogers sworn to on the 21st day of October, 1932, with proof of due service of said notice and affidavit upon counsel for said defendants, and upon the said præcipe and counter præcipe and the papers referred to therein; and after hearing the plaintiff, pro se, and Messrs. Chadbourne, Stanchfield & Levy, counsel for said defendants; and after due deliberation had in the premises; and it appearing that an extension of time to file said record is required in order that it may be prepared and printed in accordance with this order; it is

Ordered, That the record on appeal herein from the decree of the District Court for the Southern District of New York entered on the 8th day of July, 1932, to the Circuit Court of Appeals for the Second Circuit be and it hereby is settled to contain the following papers and no others, to-wit:

1. Statement of proceedings substantially in the same form as that annexed to the plaintiff's præcipe.

2. Statement prefixed to the record on the former appeal in this cause, viz., an appeal to the Circuit Court of Appeals from an order of this Court entered March 24, 1932.

3. Notice of motion in this Court returnable January 12, 1932.

[fol. 249] 4. Affidavit of Richard Reid Rogers in support of said motion.

5. Amended complaint in Rogers v. Hill et al., with exhibits thereto annexed.

6. Answer of defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, with exhibit thereto annexed.

7. Order for further particulars.

8. Stipulation as to further particulars.

9. Bill of particulars with exhibits annexed thereto.

10. Affidavit of J. Arthur Leve referring to order of consolidation.

11. Order of consolidation.

12. Stipulation as to consolidation.

13. Complaint in Rogers v. Taylor et al., with exhibits thereto annexed.

14. Order for further particulars in Rogers v. Taylor et al.

15. Stipulation as to further particulars in Rogers v. Taylor et al.

16. Bill of particulars in Rogers v. Taylor et al., with exhibits thereto annexed.

17. Affidavit of James B. Harvie, sworn to January 13, 1932.

18. Opinion of Caffey, D. J., on aforesaid motion.

19. Order of District Court entered March 24, 1932.

20. Petition for appeal from said order entered March 24, 1932, and order thereon.

21. Assignment of errors on said appeal from order of March 24, 1932.

[fol. 250] 22. Stipulation as to record on said former appeal.

23. Order settling record on said former appeal.

24. Clerk's certificate as to record on said former appeal.

25. Majority opinion of Circuit Court of Appeals upon said former appeal.

26. Dissenting opinion of Swan, C. J., upon said former appeal.

27. Order of Circuit Court of Appeals for mandate to District Court upon said former appeal.

28. Mandate of Circuit Court of Appeals to District Court upon said former appeal.

29. Order and decree of District Court entered July 8, 1932, dismissing the bills of complaint and granting certain other relief to defendants.

30. Petition for appeal from said order and decree of July 8, 1932, with order allowing said appeal, signed October 5, 1932, and filed October 6, 1932.

31. Assignment of errors on said last-named appeal.

32. Stipulation as to correctness of transcript (if agreed upon).

33. Order of District Judge settling said transcript.

34. Clerk's certificate as to correctness of said transcript.

And be it

Further ordered that the time for filing the transcript of said record on appeal with the Clerk of the Circuit Court

of Appeals for the Second Circuit be and it hereby is extended until ten days after the entry of this order.

[fol. 251] Further ordered that defendants may have an exception to the making and contents of this order.

Francis G. Caffey, D. J.

In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing, except for the papers ordered not to be reprinted, constitute a true and correct transcript of the record of the United States District Court for the Southern District of New York in the above-entitled action on appeal from the decree of said District Court entered on the 8th day of July, 1932; provided that the appellees do not hereby waive any of the exceptions allowed them by the order of said District Court dated November 1, 1932, and filed and entered November 2, 1932.

Dated New York, N. Y., November 11, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants-Appellees, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company. Richard Reid Rogers, Plaintiff-Appellant, pro se.

[fol. 252] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 253 & 253½] In United States Circuit Court of Appeals for the Second Circuit

Richard Reid Rogers, Plaintiff-Appellant,

against

George W. Hill, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants-Appellees; and A. C. Mower and Charles A. Penn (Deceased), Defendants

RICHARD REID ROGERS, Plaintiff-Appellant,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants-Appellees

Appeal from a Final Decree of the District Court for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Richard Reid Rogers, Esq., plaintiff-appellant, pro se.
Chadbourne, Stanchfield & Levy, Esqs., attorneys for appellees. Nathan L. Miller, Esq., of counsel.

OPINION

Per CURIAM:

Decree affirmed on the authority of Rogers v. Hill, 60 Fed. (2) 109 (C. C. A. 2).

A. N. HAND, J. (concurring):

I concur on the authority specified in the per curiam. With the matter open I should reach a different decision.

A. N. H.

[fol. 254] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

RICHARD REID ROGERS, Plaintiff-Appellant,

v.

GEORGE W. HILL et al., Defendants-Appellees, et al.

Same, Plaintiff-Appellant,

v.

THOMAS R. TAYLOR et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed Feb. 4, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 255] [File endorsement omitted.]

[fol. 256] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 257] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,429. U. S. Circuit Court of Appeals, Second Circuit. Term No. 732. Richard Reid Rogers, petitioner, vs. George W. Hill, A. C. Mower, Charles A. Penn, et al. Petition for a writ of certiorari and exhibit thereto. Filed February 25, 1933. File No. 37,429.